

**MISSISSIPPI CODE 1972**  
*Annotated*

**2014  
ADVANCE  
CODE  
SERVICE**

---

**Pamphlet Number 2**  
**March 2014**

---

This pamphlet updates the 2013 Cumulative  
Supplement.

Contains statutory changes made during  
the 2013 Regular Session and  
1st and 2nd Extraordinary Sessions.

Prepared by the Editorial Staff  
of the Publisher



**LexisNexis**

## QUESTIONS ABOUT THIS PUBLICATION?

For EDITORIAL QUESTIONS concerning this publication, or REPRINT PERMISSION, please call:  
800-833-9844

For CUSTOMER SERVICE ASSISTANCE concerning replacement pages, shipments, billing or other matters please call:

Customer Service Department at	800-833-9844
Outside the United States and Canada	518-421-3000
FAX	518-421-3584

For INFORMATION ON OTHER MATTHEW BENDER PUBLICATIONS, please call:

Your account manager or	800-223-1940
Outside the United States and Canada	518-487-3000

Copyright © 2014  
by  
THE STATE OF MISSISSIPPI

---

All rights reserved.

LexisNexis and the Knowledge Burst logo are registered trademarks, and Michie is a trademark of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties, Inc.

4462224

ISBN 978-0-3271-1786-5



Matthew Bender & Company, Inc.  
701 East Water Street, Charlottesville, VA 22902-5389  
*[www.lexisnexis.com](http://www.lexisnexis.com)*

## PREFACE

### **Use of Advance Code Service.**

The 2014 Advance Code Service ensures that your Mississippi Code of 1972 Annotated is always as current as possible by providing Judicial Decision notes, Attorney General Opinions, Ethics Opinions, research references, and references to law review articles. The ACS may also include changes to statutory provisions, and editorial comments. It ships three times a year, in the period between annual Code supplement pamphlet shipments. Advance Code Service pamphlets are cumulative and may be discarded or recycled upon receipt of later pamphlets.

### **Format.**

Material in the Advance Code Service follows the structure of the Mississippi Code of 1972 Annotated and should be used in conjunction with the Code and its 2013 Supplement.

### **Annotations.**

This publication contains annotations taken from decisions of the Mississippi Supreme Court and Court of Appeals. These cases will be printed in the following reporters:

Southern Reporter, 3rd Series  
United States Supreme Court Reports  
Supreme Court Reporter  
United States Supreme Court Reports, Lawyers' Edition, 2nd Series  
Federal Reporter, 3rd Series  
Federal Supplement, 2nd Series  
Federal Rules Decisions  
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 6th Series  
American Law Reports, Federal Series  
Mississippi College Law Review  
Mississippi Law Journal

In addition, published opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

## PREFACE

### **Information, suggestions, comments, and questions.**

Visit the LexisNexis website at <http://www.lexisnexis.com> for an online bookstore, technical support, customer support, and other company information.

For further information or assistance, please call us toll free at (800) 833-9844, fax us toll free at (800) 643-1280, email us at [customer.support@bender.com](mailto:customer.support@bender.com), or write to: Mississippi Code Editor, LexisNexis, 701 E. Water Street, Charlottesville, VA 22902-5389.

March 2014

LEXISNEXIS



# THE CONSTITUTION OF THE UNITED STATES OF AMERICA

## ARTICLE VI

DEBTS VALIDATED; SUPREME LAW OF LAND; OATH OF OFFICE

### JUDICIAL DECISIONS

#### 1. Supremacy of law.

In light of 47 USCS § 227(e)(1)'s carefully-drafted language and legislative history, and in spite of presumption against preemption that attaches to State's exercise of its police power, there is inherent federal objective in Truth in Caller ID Act of 2009 to protect non-harmful spoofing; Mississippi Caller ID Anti-Spoofing Act's proscription of non-harmful spoofing (spoofing done without intent to defraud, cause harm, or wrongfully obtain any-

thing of value) frustrates this federal objective and is, therefore, conflict-preempted. *Teltech Sys. v Bryant*, 702 F3d 232 (5th Cir. 2012).

Because court held that Mississippi Caller ID Anti-Spoofing Act was conflict-preempted by Truth in Caller ID Act of 2009, court did not need to consider its validity under dormant Commerce Clause or First Amendment. *Teltech Sys. v Bryant*, 702 F3d 232 (5th Cir. 2012).

## AMENDMENTS

### AMENDMENT IV

SEARCH AND SEIZURE

### JUDICIAL DECISIONS

19. Search warrant — In general.

21. — Probable cause, search warrant.

27. Search without warrant — In general.

33. —Motor vehicles, search without warrant.

19. Search warrant — In general.

21. — Probable cause, search warrant.

Substantial basis existed for a finding of probable cause to issue search warrants for defendant's person and vehicle because the oral testimony of the officer who requested the search warrants raised a fair probability that evidence of the crime would be found on defendant's person and in defendant's vehicle. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

27. Search without warrant — In general.

33. —Motor vehicles, search without warrant.

Defendant's vehicle was stopped lawfully and an officer had probable cause to conduct a walk-around inspection of the vehicle because police were "looking for a vehicle as a murder weapon," witnesses identified the victim as being with defendant, police arrested defendant on an outstanding warrant, and an officer noticed something hanging from the vehicle that was later determined to be the victim's skin. *Galloway v. State*, 122 So. 3d 614 (Miss. 2013).

Traffic stop was reasonable where an officer determined via his radar that defendant's speed was 69 miles per hour in a

55 mile per hour zone, and testified that he estimated the speed by following defendant; even if the officer was operating his radar incorrectly, his testimony estab-

lished a reasonable belief that speeding, a traffic violation, had occurred. *Freeman v. State*, 121 So. 3d 888 (Miss. 2013).

## AMENDMENT V

GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION;  
DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

## JUDICIAL DECISIONS

17. Self-incrimination — In general.

24. —Request for counsel, self-incrimination.

31.5. — Custodial interrogation, self-incrimination.

38. — Voluntariness of confession, self-incrimination.

79. Trial conduct, due process.

**17. Self-incrimination — In general.**

**24. —Request for counsel, self-incrimination.**

Trial court manifestly erred in failing to suppress defendant's statement to the police because the police subjected defendant to interrogation after he had invoked his right to counsel, and the State failed to prove that defendant's waiver of rights was knowing, intelligent, and voluntary. *Benjamin v. State*, 116 So. 3d 115 (Miss. 2013).

**31.5. — Custodial interrogation, self-incrimination.**

When the police encourage a parent to pressure a 14-year-old suspect to talk, and the police foster the suspect's mistaken belief that talking would allow him to avoid a night in jail, the police should know their conduct is reasonably likely to elicit an incriminating response; the tactics used by police that encouraged defendant's belief that, by talking to the police, he could avoid a night in jail, and that allowed his mother to speak with defen-

dant after instructing her on how he could reinstate questioning constituted the functional equivalent of interrogation because they were reasonably likely to elicit an incriminating response from the 14-year-old defendant. *Benjamin v. State*, 116 So. 3d 115 (Miss. 2013).

Where the police used tactics that constituted the functional equivalent of interrogation, because they were reasonably likely to elicit an incriminating response from defendant, defendant was subjected to interrogation after invoking his right to counsel. *Benjamin v. State*, 116 So. 3d 115 (Miss. 2013).

**38. — Voluntariness of confession, self-incrimination.**

Defendant's pre-trial statements were admissible because the trial court did not manifestly err in finding that defendant's affirmative nod to an officer and signing of a rights waiver form constituted an effective waiver of defendant's Miranda rights. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

**79. Trial conduct, due process.**

Indictment for robbery was appropriate because defendant's due process rights were not violated as the indictment was not required to have specified the items alleged to have been taken in the robbery. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

## AMENDMENT VI

## JURY TRIAL FOR CRIMES AND PROCEDURAL RIGHTS

## JUDICIAL DECISIONS

- 2. Information of accusation.
- 11.5. Instructions.
- 15. Speedy trial — In general.
- 33. —Totality of circumstances, speedy trial.
- 65. Confrontation of witnesses — In general.
- 74. — Unavailable witnesses, confrontation of witnesses.
- 76. —Test results, confrontation of witnesses.
- 80. Assistance of counsel — In general.
- 98. — Waiver, assistance of counsel.
- 113. — Failure to object to or request instructions as ineffectiveness of counsel, assistance of counsel.

**2. Information of accusation.**

Defendant's due process rights were not violated as the indictment was not required to have specified the items alleged to have been taken in a robbery. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

Dismissal of an indictment charging defendant with being a felon in possession of a weapon and reversal of the conviction thereunder were required because the indictment failed to specify which, if any, of the four types of prohibited knives defendant was alleged to have possessed in violation of defendant's federal and state constitutional rights. *Thomas v. State*, 126 So. 3d 877 (Miss. 2013).

**11.5. Instructions.**

Because the jury was instructed on all the elements of capital murder, defendant was not deprived of the constitutional rights to a fair trial and to a jury determination of every element of the crime charged when defendant was convicted under the one continuous transaction doctrine of capital murder with the underlying felony of robbery. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

**15. Speedy trial — In general.****33. —Totality of circumstances, speedy trial.**

Defendant's constitutional right to a speedy trial was not violated because,

although there was a delay of 424 days, the case was complicated and required the use of experts for both sides, and a witness did actually identify defendant from a six-photo line-up a few days after the murder. *Galloway v. State*, 122 So. 3d 614 (Miss. 2013).

**65. Confrontation of witnesses — In general.**

There was no Confrontation Clause or hearsay violation in an officer's testimony because the officer did not testify that the two people who identified defendant as the shooter were eyewitnesses, the officer did not convey any statements or assertions made by the two anonymous people, either directly or indirectly, and the officer did not reveal the substance of the conversations; the officer stated that defendant became a suspect during the course of her investigation, but it was clear that her investigation involved much more than a conversation with these two people. Thus, it was not apparent that the testimony at issue was hearsay or that the unnamed people could be classified as accusers. *Keithley v. State*, 111 So. 3d 1202 (Miss. 2013).

**74. — Unavailable witnesses, confrontation of witnesses.**

Testimony that the victim, on the day that the victim was murdered, had made a complaint that money was missing from the victim's bank account was admissible because the statement was not admitted to prove that money was missing from the victim's account, but only to show that the victim had reported the theft to the authorities, which tended to show that defendant had felt threatened, and, thus, had a motive for the murder of the victim. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

**76. —Test results, confrontation of witnesses.**

Defendant's confrontation rights were not violated because as the technical re-



viewer assigned to the case, the witness was familiar with each step of the complex DNA testing process conducted by the analyst; the witness personally analyzed the data generated by each test conducted by the analyst and signed the report. *Galloway v. State*, 122 So. 3d 614 (Miss. 2013).

#### **80. Assistance of counsel — In general.**

##### **98. — Waiver, assistance of counsel.**

Circuit court did not err in finding that defendant waived his right under U.S. Const. amend VI and Miss. Const. art. 3, § 26 to the assistance of counsel under Miss. Unif. Cir. & Cty. R. 8.05 where the record was clear that even after the circuit court apprised defendant of his rights, he refused to participate in his trial. Defendant purposefully intended to use his absolute right to counsel to avoid going to trial, a course of action that the Alabama Supreme Court specifically proscribed; ad-

ditionally, defendant's waiver was knowing and voluntary since he was fully aware of the rights that he would be jeopardizing by proceeding without counsel. *Lewis v. State*, — So. 3d —, 2013 Miss. App. LEXIS 129 (Miss. Ct. App. Mar. 19, 2013), writ of certiorari denied by 2014 Miss. LEXIS 94 (Miss. Feb. 6, 2014).

#### **113. — Failure to object to or request instructions as ineffectiveness of counsel, assistance of counsel.**

In a burglary prosecution, defense counsel was not ineffective for failing to request a circumstantial-evidence instruction; because the State produced direct evidence of the gravamen of the offense, defendant had not been entitled to such an instruction. *Grayer v. State*, — So. 3d —, 2013 Miss. LEXIS 187 (Miss. May 2, 2013), opinion withdrawn by, substituted opinion at, remanded by 120 So. 3d 964, 2013 Miss. LEXIS 370 (Miss. 2013).

### AMENDMENT VIII

#### EXCESSIVE BAIL, FINES, PUNISHMENTS

### JUDICIAL DECISIONS

#### 1.5. Constitutionality.

##### 15. Cruel and unusual punishment — In general.

##### 16. — Age of defendant, cruel and unusual punishment.

#### 1.5. Constitutionality.

Defendant's sentence of death by lethal injection for the crime of capital murder with the underlying felony of robbery was not unconstitutional because defendant's due process rights were not violated as the indictment and jury instructions were sufficient, the aggravating circumstances supported the sentence, and Mississippi's lethal-injection protocol did not constitute cruel and unusual punishment. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

##### 15. Cruel and unusual punishment — In general.

##### 16. — Age of defendant, cruel and unusual punishment.

Where a juvenile convicted of murder receives a life sentence, conditional re-

lease does not satisfy the mandate of *Miller v. Alabama*, 2012 U.S. LEXIS 4873, because conditional release is more akin to clemency, which is different from parole despite some surface similarities, and conditional release would not be determined by the sentencing authority at the time of sentencing based on age and other characteristics, as *Miller* mandates. *Parker v. State*, 119 So. 3d 987 (Miss. 2013).

Miss. Code Ann. § 47-7-3(1)(h) can constitutionally be applied to juveniles provided that the sentencing authority considers the factors of *Miller v. Alabama*, 2012 U.S. LEXIS 4873, in imposing the sentence. *Parker v. State*, 119 So. 3d 987 (Miss. 2013).

As defendant was 15 at the time of the murder and pursuant to Miss. Code Ann. § 47-7-3(1)(h) was not eligible for parole, and as *Miller v. Alabama*, 2012 U.S. LEXIS 4873, was decided while his appeal was pending, his life sentence was vacated and the case was remanded so the trial

court could consider the Miller factors before determining sentence. *Parker v. State*, 119 So. 3d 987 (Miss. 2013).

## AMENDMENT XIV

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION;  
APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT;  
ENFORCEMENT

## JUDICIAL DECISIONS

- 12. Equal protection — In general.
- 15. Due process —In general.
- 17. — Procedural due process.
- 26. Children, generally.
- 27. Child custody and adoption.
- 77. Racial discrimination — In general.
- 81.5. — Race-neutral exercise of peremptory challenges, impartial jury.
- 104. Criminal practice and procedure — In general.
- 121. — Conduct of trial, criminal practice and procedure.
- 128. — Instructions to jury, criminal practice and procedure.
- 131. — Sentencing proceeding, criminal practice and procedure.

### 12. Equal protection — In general.

Bar applicant's Equal Protection claim failed as a matter of law because not only did the applicant fail to allege purposeful discrimination, but the applicant also failed to offer any evidence that the Mississippi Board of Bar Admissions' rules and policies actually had a disproportionate impact. *Griffin v. Miss. Bd. of Bar Admissions*, 113 So. 3d 1257 (Miss. 2013).

### 15. Due process —In general.

### 17. — Procedural due process.

Out-of-state law firm was subject to personal jurisdiction in Mississippi with respect to claims of legal malpractice and related other issues because the firm committed a tort against a contractor within the State of Mississippi, it had sufficient minimum contacts within the State, and traditional notions of fair play and substantial justice were not offended because it purposefully availed itself of the benefits and protections of Mississippi law. *Baker & McKenzie, LLP v. Evans*, 123 So. 3d 387 (Miss. 2013).

### 26. Children, generally.

Law does not allow parental rights to supercede the best interests of the child; parental rights, as is true of other fundamental rights, can be forfeited or taken away, and the law does recognize some means by which third parties can overcome the law's preference of natural parents. *Davis v. Vaughn*, 126 So. 3d 33 (Miss. 2013).

### 27. Child custody and adoption.

Chancery court did not err in granting custody to the father after finding that he had not deserted his child because there was no legally compelling reason to alter or abandon the established standards for rebuttal of the natural-parent presumption; requiring the maternal grandmother first to demonstrate that the father had relinquished his right to parent his child was not an undue burden. *Davis v. Vaughn*, 126 So. 3d 33 (Miss. 2013).

### 77. Racial discrimination — In general.

### 81.5. — Race-neutral exercise of peremptory challenges, impartial jury.

Defendant's equal protection rights were not violated because, although defendant, who was an African-American, was tried by an all-white jury, the State of Mississippi provided race neutral reasons for exercising peremptory challenges on African-American jurors, the death-qualification process itself did not disproportionately impact African-American venire persons, and the trial court did not abuse its discretion in denying defendant's challenges to jurors for cause. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).



#### **104. Criminal practice and procedure — In general.**

Indictment for robbery was appropriate because defendant's due process rights were not violated as the indictment was not required to have specified the items alleged to have been taken in the robbery. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

#### **121. — Conduct of trial, criminal practice and procedure.**

Defendant's due process rights were violated where the State destroyed a video of a traffic stop and the moments before it while under a court order to preserve it, which impaired the defense since the video would have clarified material disputed facts as to whether defendant admitted to drinking alcohol, whether he slurred his words, whether his coordination was impaired, how he was driving immediately prior to the stop, the interaction between the two men and the portable breath test results. *Freeman v. State*, 121 So. 3d 888 (Miss. 2013).

#### **128. — Instructions to jury, criminal practice and procedure.**

Because the jury was instructed on all the elements of capital murder, defendant

was not deprived of the constitutional rights to a fair trial and to a jury determination of every element of the crime charged when defendant was convicted under the one continuous transaction doctrine of capital murder with the underlying felony of robbery. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

#### **131. — Sentencing proceeding, criminal practice and procedure.**

Victim-impact testimony of the murder victim's parent was admissible because the parent testified as to the parent's relationship with the victim and the impact the victim's death had had on the family, and the victim-impact testimony was not so inflammatory as to have prejudiced defendant or to have rendered defendant's trial fundamentally unfair. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

State of Mississippi was permitted to impeach defense witnesses, who testified at a sentencing hearing as to defendant's good character, by asking if the witnesses were aware that defendant had pleaded guilty to a felony charge of credit-card fraud. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

# THE CONSTITUTION OF THE STATE OF MISSISSIPPI

## ARTICLE 1.

### DISTRIBUTION OF POWERS.

#### § 1. Powers of government.

##### JUDICIAL DECISIONS

8. Judicial powers and functions—In general.

16. Encroachment—In general.

18. — — Upon judicial power, encroachment.

**8. Judicial powers and functions—In general.**

Power to grant the authority to require parents in Mississippi to support their adult children financially was confided to the Mississippi Legislature. The Mississippi courts were without the constitutional power to declare otherwise. *Hays v. Alexander*, 114 So. 3d 704 (Miss. 2013).

**16. Encroachment—In general.**

**18. — — Upon judicial power, encroachment.**

Because Miss. Code Ann. § 11-1-60(2)(b) does not apply to the verdict, it

cannot affect a trial court's application or non-application of remittitur pursuant to Miss. Code Ann. § 11-1-55. Therefore, § 11-1-60(2)(b) does not directly conflict with remittitur (a judicial procedure), and does not violate the Mississippi Constitution's Separation of Powers Clauses, Miss. Const. art. I, §§ 1, 2. *Learmonth v. Sears, Roebuck and Co.*, 710 F.3d 249 (5th Cir. 2013).

#### § 2. Encroachment of power.

##### JUDICIAL DECISIONS

1. Encroachment of power — In general.

4. — — Judicial branch, encroachment of power.

**1. Encroachment of power — In general.**

**4. — — Judicial branch, encroachment of power.**

Because Miss. Code Ann. § 11-1-60(2)(b) does not apply to the verdict, it

cannot affect a trial court's application or non-application of remittitur pursuant to Miss. Code Ann. § 11-1-55. Therefore, § 11-1-60(2)(b) does not directly conflict with remittitur (a judicial procedure), and does not violate the Mississippi Constitution's Separation of Powers Clauses, Miss. Const. art. I, §§ 1, 2. *Learmonth v. Sears, Roebuck and Co.*, 710 F.3d 249 (5th Cir. 2013).

## ARTICLE 3.

## BILL OF RIGHTS.

## § 14. Due process.

## JUDICIAL DECISIONS

- 8. Judicial proceedings—In general.
- 12. — — Child custody, judicial proceedings.
- 18. Crimes and criminal procedure — In general.
- 20. — — Affidavits or indictments, crimes and criminal procedure.

**8. Judicial proceedings—In general.****12. — — Child custody, judicial proceedings.**

Law does not allow parental rights to supercede the best interests of the child; parental rights, as is true of other fundamental rights, can be forfeited or taken away, and the law does recognize some means by which third parties can overcome the law's preference of natural parents. *Davis v. Vaughn*, 126 So. 3d 33 (Miss. 2013).

Chancery court did not err in granting custody to the father after finding that he

had not deserted his child because there was no legally compelling reason to alter or abandon the established standards for rebuttal of the natural-parent presumption; requiring the maternal grandmother first to demonstrate that the father had relinquished his right to parent his child was not an undue burden. *Davis v. Vaughn*, 126 So. 3d 33 (Miss. 2013).

**18. Crimes and criminal procedure — In general.****20. — — Affidavits or indictments, crimes and criminal procedure.**

Indictment for robbery was appropriate because defendant's due process rights were not violated as the indictment was not required to have specified the items alleged to have been taken in the robbery. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

## § 22. Double jeopardy.

## JUDICIAL DECISIONS

- 13. Identity of offenses—In general.
- 15. Sentence and punishment—In general.

**13. Identity of offenses—In general.**

Indictment for robbery was appropriate because defendant's due process rights were not violated as the indictment was not required to have specified the items alleged to have been taken in the robbery. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

**15. Sentence and punishment—In general.**

Having failed to prove at trial that defendant was a habitual offender under

Miss. Code Ann. § 99-19-81, the State could not attempt to prove his habitual-offender status on remand, as that would violate the prohibition against double jeopardy set forth in Miss. Const. art. III, § 22. *Grayer v. State*, — So. 3d —, 2013 Miss. LEXIS 187 (Miss. May 2, 2013), opinion withdrawn by, substituted opinion at, remanded by 120 So. 3d 964, 2013 Miss. LEXIS 370 (Miss. 2013).



## § 23. Searches and seizures.

### JUDICIAL DECISIONS

- 2. Searches and seizures — In general.
- 2.5. — Excessive force, searches and seizures.
- 4. — — Stops and detentions, searches and seizures.
- 12. Search warrants — In general.
- 15. — — Showing of probable cause, search warrants.
- 21. Warrantless searches and seizures — In general.
- 28. — — Motor vehicle searches, warrantless searches and seizures.
- 31. — — Consent or waiver, warrantless searches and seizures.

#### 2. Searches and seizures — In general.

##### 2.5. — Excessive force, searches and seizures.

##### 4. — — Stops and detentions, searches and seizures.

Because the anonymous tip was suitably corroborated to provide reasonable suspicion for an investigatory stop, the officers were justified in making an investigatory stop to resolve the ambiguous situation; thus, defendant's conviction for misdemeanor driving under the influence was lawful. *Cook v. Rankin County*, — So. 3d —, 2013 Miss. App. LEXIS 831 (Miss. Ct. App. Dec. 3, 2013).

##### 12. Search warrants — In general.

##### 15. — — Showing of probable cause, search warrants.

Trial court did not err by finding that there was a substantial basis for a finding

of probable cause to issue a search warrants for defendant's person and vehicle because the oral testimony of the officer who requested the search warrant raised a fair probability that evidence of the crime would be found on defendant's person and in defendant's vehicle. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

##### 21. Warrantless searches and seizures — In general.

##### 28. — — Motor vehicle searches, warrantless searches and seizures.

Defendant's vehicle was stopped lawfully and an officer had probable cause to conduct a walk-around inspection of the vehicle because police were "looking for a vehicle as a murder weapon," witnesses identified the victim as being with defendant, police arrested defendant on an outstanding warrant, and an officer noticed something hanging from the vehicle that was later determined to be the victim's skin. *Galloway v. State*, 122 So. 3d 614 (Miss. 2013).

##### 31. — — Consent or waiver, warrantless searches and seizures.

Trial court did not abuse its discretion in denying defendant's motion to suppress photographs found at his mother's home because defendant did not offer any evidence that his mother did not consent to the search of the house where the incident occurred in his motion to suppress or in his argument at the hearing. *Brown v. State*, 119 So. 3d 1079 (Miss. Ct. App. 2013).

## § 26. Rights of accused; state grand jury proceedings.

### JUDICIAL DECISIONS

- 39. Speedy trial — In general.
- 43. — — Invocation of right, speedy trial.
- 44. — — Factors considered, speedy trial.
- 46. — — Delay attributable primarily to defendant, speedy trial.
- 89. Nature and cause of accusation — In general.

- 93. — — Specificity, nature and cause of accusation.
- 96. — — Sufficiency, nature and cause of accusation.
- 108. Confrontation of witnesses — In general.
- 114. — — Unavailable witnesses, con-

frontation of witnesses.

- 117. — — Test results and testing equipment, confrontation of witnesses.
- 122. — — Hearsay evidence, confrontation of witnesses.
- 125. Right to counsel — In general.
- 127. — — Pro se or hybrid representation, right to counsel.
- 141. — — Waiver, right to counsel.
- 142. Ineffectiveness of counsel — In general.

### **39. Speedy trial — In general.**

#### **43. — — Invocation of right, speedy trial.**

Defendant was procedurally barred on direct appeal from raising the issue of whether defendant's right to a speedy trial was violated because, while defendant filed numerous motions on the issue, neither defendant nor, counsel set them for a hearing or requested a ruling. Dismissal without prejudice preserved defendant's ability to raise the issue in a motion for post-conviction relief in association with an ineffective assistance of counsel claim for failure to request a hearing on the motions. *Ellis v. State*, — So. 3d —, 2013 Miss. App. LEXIS 718 (Miss. Ct. App. Oct. 29, 2013).

#### **44. — — Factors considered, speedy trial.**

Defendant's constitutional right to a speedy trial was not violated because, although there was a delay of 424 days, the case was complicated and required the use of experts for both sides, and a witness did actually identify defendant from a six-photo line-up a few days after the murder. *Galloway v. State*, 122 So. 3d 614 (Miss. 2013).

Defendant's right to a speedy trial was not violated because the factors weighing in favor of defendant regarding the length and the reason for the delay were neutralized when defendant failed to assert her right, and because she failed to show any resulting prejudice from the 18-and-a-half month delay. *McClendon v. State*, 124 So. 3d 709 (Miss. Ct. App. 2013).

As a trial court, on remand, failed to give defendant a meaningful opportunity to present evidence of prejudice with respect to the Barker factors for his speedy

trial claim, arising from a forfeiture action initiated by the county, the remand order was not complied with and the evidence could not be properly weighed. One 1970 Mercury Cougar v. Tunica County, 115 So. 3d 792 (Miss. 2013).

Defendant's right to a speedy trial was not violated because defendant's own requests for continuances delayed his trial date for almost three years, he neglected to assert his right to a speedy trial until almost a year after his arrest, and the delay did not result in any prejudice to the defense. *Bateman v. State*, 125 So. 3d 616 (Miss. 2013).

#### **46. — — Delay attributable primarily to defendant, speedy trial.**

Defendant's right to a speedy trial was not violated because defendant neither alleged prejudice to the defense of the charge against defendant, nor did defendant demonstrate that defendant had suffered anxiety from the charge. Furthermore, the record reflected that the majority of the delay was attributable to defendant as the trial was twice continued due to defense counsel's illness, and defendant signed both continuance orders, waiving the right to a speedy trial. *Jackson v. State*, 121 So. 3d 313 (Miss. Ct. App. 2013).

### **89. Nature and cause of accusation — In general.**

#### **93. — — Specificity, nature and cause of accusation.**

Indictment for robbery was appropriate because defendant's due process rights were not violated as the indictment was not required to have specified the items alleged to have been taken in the robbery. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

#### **96. — — Sufficiency, nature and cause of accusation.**

Dismissal of an indictment charging defendant with being a felon in possession of a weapon and reversal of the conviction thereunder were required because the indictment failed to specify which, if any, of the four types of prohibited knives defendant was alleged to have possessed in violation of defendant's federal and state



constitutional rights. *Thomas v. State*, 126 So. 3d 877 (Miss. 2013).

**108. Confrontation of witnesses — In general.**

There was no Confrontation Clause or hearsay violation in an officer's testimony because the officer did not testify that the two people who identified defendant as the shooter were eyewitnesses, the officer did not convey any statements or assertions made by the two anonymous people, either directly or indirectly, and the officer did not reveal the substance of the conversations; the officer stated that defendant became a suspect during the course of her investigation, but it was clear that her investigation involved much more than a conversation with these two people. Thus, it was not apparent that the testimony at issue was hearsay or that the unnamed people could be classified as accusers. *Keithley v. State*, 111 So. 3d 1202 (Miss. 2013).

**114. — — Unavailable witnesses, confrontation of witnesses.**

Admission of a police detective's videotaped deposition testimony into evidence was not an abuse of discretion because the detective had serious health complications and was considered by the circuit judge to have been unavailable at the trial. Moreover, defense counsel had the opportunity to cross-examine the detective during the deposition, with defendant present. *McKenzie v. State*, 119 So. 3d 1145 (Miss. Ct. App. 2013).

**117. — — Test results and testing equipment, confrontation of witnesses.**

Defendant's confrontation rights were not violated because as the technical reviewer assigned to the case, the witness was familiar with each step of the complex DNA testing process conducted by the analyst; the witness personally analyzed the data generated by each test conducted by the analyst and signed the report. *Galloway v. State*, 122 So. 3d 614 (Miss. 2013).

**122. — — Hearsay evidence, confrontation of witnesses.**

Defendant's fundamental, substantive confrontation rights were not violated, be-

cause, since its inception, the right to confront one's accuser carved out an exception for dying declarations, and the court properly admitted the victim's statement as a dying declaration. *Grindle v. State*, — So. 3d —, 2013 Miss. App. LEXIS 535 (Miss. Ct. App. Aug. 27, 2013).

As a witness to defendant's fatal shooting of a victim testified and all of the traditional constitutional protections were present, defendant's confrontation rights were not violated by testimony from a police officer who recited the witness's statement. *Davis v. State*, — So. 3d —, 2013 Miss. App. LEXIS 490 (Miss. Ct. App. Aug. 13, 2013), writ of certiorari denied by 2014 Miss. LEXIS 73 (Miss. Jan. 30, 2014).

**125. Right to counsel — In general.**

**127. — — Pro se or hybrid representation, right to counsel.**

No on-the-record examination was necessary to determine whether defendant knowingly and voluntarily waived the right to counsel because he received substantive assistance from his counsel in the form of hybrid representation; even if no hybrid representation were found, the requirements of the rule that defendant knowingly and voluntarily waive the right to counsel were met as the trial court made it sufficiently clear to defendant the requirements and perils of self-representation. *Wash v. State*, — So. 3d — 2013 Miss. App. LEXIS 763 (Miss. Ct. App. Nov. 12, 2013).

**141. — — Waiver, right to counsel.**

Circuit court did not err in finding that defendant waived his right under U.S. Const. amend VI and Miss. Const. art. 3, § 26 to the assistance of counsel under Miss. Unif. Cir. & Cty. R. 8.05 where the record was clear that even after the circuit court apprised defendant of his rights, he refused to participate in his trial. Defendant purposefully intended to use his absolute right to counsel to avoid going to trial, a course of action that the Alabama Supreme Court specifically proscribed; additionally, defendant's waiver was knowing and voluntary since he was fully aware of the rights that he would be jeopardizing by proceeding without coun-

sel. *Lewis v. State*, — So. 3d —, 2013 Miss. App. LEXIS 129 (Miss. Ct. App. Mar. 19, 2013), writ of certiorari denied by 2014 Miss. LEXIS 94 (Miss. Feb. 6, 2014).

#### **142. Ineffectiveness of counsel — In general.**

In a burglary prosecution, defense counsel was not ineffective for failing to request a circumstantial-evidence instruction; because the State produced direct evidence of the gravamen of the offense, defendant had not been entitled to such an instruction. *Grayer v. State*, — So. 3d

—, 2013 Miss. LEXIS 187 (Miss. May 2, 2013), opinion withdrawn by, substituted opinion at, remanded by 120 So. 3d 964, 2013 Miss. LEXIS 370 (Miss. 2013).

Any claim of ineffective assistance of counsel was without merit because there was no supporting affidavit other than one from appellant. *Collier v. State*, 112 So. 3d 1088 (Miss. Ct. App. 2013).

Alleged deficiencies of counsel were not based on facts fully apparent from the record, and were more appropriate for post-conviction review. *Keithley v. State*, 111 So. 3d 1202 (Miss. 2013).

### **§ 31. Trial by jury.**

#### **JUDICIAL DECISIONS**

##### **5. Right of trial by jury generally.**

Appellant was not entitled to a jury trial in his suit against the State under Miss. Code Ann. § 11-44-7(1), alleging wrongful conviction and imprisonment, because the right to a jury trial applies only to those

cases in which a jury trial was necessary at common law, and at common law, sovereign immunity prevented citizens from suing the State. *Hymes v. State*, 121 So. 3d 938 (Miss. Ct. App. 2013).

#### **ARTICLE 4.**

#### **LEGISLATIVE DEPARTMENT.**

#### **MISCELLANEOUS**

### **§ 104. Statutes of limitation not to run against State and political subdivisions.**

#### **JUDICIAL DECISIONS**

##### **7. Subdivisions, agencies, etc., protected.**

Statute of limitations did not apply to a school district's claim for a refund of oil and gas severance taxes because Miss. Const. art. IV, § 104 and Miss. Code Ann.

§ 15-1-51 provided that statutes of limitation in civil causes did not run against the state or its subdivisions. *Jones County Sch. Dist. v. Miss. Dep't of Revenue*, 111 So. 3d 588 (Miss. 2013).

### **§ 112. Equal taxation; property tax assessments.**

#### **JUDICIAL DECISIONS**

##### **7. Valuation of property.**

Legislature did not violate the constitution when it enacted Miss. Code Ann. § 27-35-50(4)(d) because this section ex-

plicitly allows the Legislature to adopt laws which dictate how true value is to be determined. *Willow Bend Estates, LLC v. Humphreys County Bd. of Supervisors*, —

So. 3d —, 2013 Miss. LEXIS 550 (Miss. Oct. 17, 2013).

Trial court erred in finding that subsection (4)(d) did not preclude a county from including tax credits in the valuation privately owned housing complexes that were built in part using capital created by federal tax credits under the Low-Income Housing Tax Credit Program because the

properties, in terms of value, were not similarly situated to ordinary private complexes; the Legislature properly exercised its prerogative in limiting the valuation method for such properties. *Willow Bend Estates, LLC v. Humphreys County Bd. of Supervisors*, — So. 3d —, 2013 Miss. LEXIS 550 (Miss. Oct. 17, 2013).

## ARTICLE 6.

### JUDICIARY.

## § 146. Jurisdiction of Supreme Court.

### JUDICIAL DECISIONS

#### 15. Scope of judicial review.

Miss. Code Ann. § 23-15-927 did not impermissibly violate separation of powers or Miss. Const. art. 6, § 146; rather, the judicial relief sought under the election code was unique unto itself and es-

tablished by statute, until the process reached the Mississippi Supreme Court, where procedure was controlled by the Mississippi Rules of Appellate Procedure. *Jackson v. Bell*, 123 So. 3d 436 (Miss. 2013).

## § 159. Jurisdiction of chancery court.

### JUDICIAL DECISIONS

#### 7. Divorce and alimony.

As a wife's conversion claim against her husband was really a request for a award of marital assets that ordinarily would be distributed in the divorce action, the circuit court erred in denying the husband's motion to transfer that claim to the parties' divorce action which was pending in chancery court. *Germany v. Germany*, 123 So. 3d 423 (Miss. 2013).

Wife's claims against her husband which she brought in circuit court that were more closely related to the parties' marital relationship and financial affairs had to be decided in chancery court; her claims against him for intentional and negligent infliction of emotional distress, along with her alienation of affection claims against his alleged paramour, were purely legal and were properly before the

circuit court. *Germany v. Germany*, 123 So. 3d 423 (Miss. 2013).

Circuit court erred in denying a husband's motion to transfer his wife's claim for unjust enrichment to the parties' divorce action which was pending in chancery court, because 1) it was an equitable claim, and 2) to allow her to pursue that claim in circuit court could lead to a double recovery if she was awarded alimony by the chancery court. *Germany v. Germany*, 123 So. 3d 423 (Miss. 2013).

As the substance of a wife's breach-of-contract and fraud claims against her husband was related to divorce and alimony, the circuit court erred in denying the husband's motion to transfer those claims to the parties' divorce action which was pending in chancery court. *Germany v. Germany*, 123 So. 3d 423 (Miss. 2013).



## § 161. Concurrent jurisdiction of chancery and circuit court.

### JUDICIAL DECISIONS

#### 3. Mutual and complicated accounts.

Circuit court erred in denying a husband's motion to transfer his wife's claim for an accounting to the parties' divorce action which was pending in chancery

court, because the chancery court had concurrent jurisdiction over that claim and was in a better position to address it; *Germany v. Germany*, 123 So. 3d 423 (Miss. 2013).

## § 177A. Commission on Judicial Performance.

### JUDICIAL DECISIONS

7. Willful misconduct.
8. Sanctions—In general.
9. — — Reprimand, sanctions.

#### 7. Willful misconduct.

Judge committed willful misconduct and conduct prejudicial to the administration of justice, bringing the judicial office into disrepute, because the judge recused himself from cases, and then, with full knowledge that he was recused, reinserted himself and took further action in the cases; the judge abused the contempt power by issuing arrest warrants for indirect criminal contempt that led to parents being held without bond for seventy-two hours without notice or a hearing; *Miss. Comm'n on Judicial Performance v. Skinner*, 119 So. 3d 294 (Miss. 2013).

Analysis of the extent of willfulness will allow for consideration of acts of dishonesty, and the inappropriateness of the action may also be considered under the aggravating circumstances factor; when analyzing the extent to which the conduct exploited the judge's position to satisfy personal desires, we will examine factors such as whether the judge received money, received favors, or otherwise acted in a manner indicative of any improper personal motivation. *Miss. Comm'n on Judicial Performance v. Skinner*, 119 So. 3d 294 (Miss. 2013).

Supreme court will examine the extent to which the conduct was willful, and the extent to which the conduct exploited the judge's position to satisfy his or her personal desires or was intended to deprive the public of assets or funds rightfully belonging to it; in examining the extent to

which the conduct was willful, the supreme court will examine whether the judge acted in bad faith, good faith, intentionally, knowingly, or negligently. *Miss. Comm'n on Judicial Performance v. Skinner*, 119 So. 3d 294 (Miss. 2013).

#### 8. Sanctions—In general.

Judge was publicly reprimanded, suspended, and fined because he committed willful misconduct and conduct prejudicial to the administration of justice when he recused himself from cases and reinserted himself and took further action in the cases and abused the contempt power; however, there was no evidence of any premeditation, that the judge's conduct was done to satisfy any personal desires, or that the judge personally gained from his actions. *Miss. Comm'n on Judicial Performance v. Skinner*, 119 So. 3d 294 (Miss. 2013).

As a judge violated Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(B)(2), 3(B)(4), and 3(C)(1), and Miss. Const. art. VI, § 177A by attempting to use his office to advance the private interests of his tenant and himself as landlord, and by being impatient and discourteous and abusing his contempt power when arguing with a probation officer, and he had a pattern of prior misconduct, he was publicly reprimanded and fined. *Miss. Comm'n on Judicial Performance v. Fowlkes*, 121 So. 3d 904 (Miss. 2013).

#### 9. — — Reprimand, sanctions.

Judge was publicly reprimanded, fined, and assessed costs of the proceeding because the judge, among other things, men-

tioned to counsel in chambers, but did not make a disclosure on the record, that his father might have been tested for asbestosis, failed to disclose the history of his parent's asbestosis claims, and the settlement between the judge's father and one

of the parties, and failed to rule on counsel's motion to recuse made after the conflict was discovered. Miss. Comm'n on Judicial Performance v. Bowen, 123 So. 3d 381 (Miss. 2013).

## ARTICLE 8.

## EDUCATION.

**§ 206A. Establishment of education improvement trust fund.****JUDICIAL DECISIONS****1. In general.**

Miss. Const. art. 8, § 206A does not require the state or its political subdivisions to pay oil and gas severance taxes on

its sixteenth-section royalty interests, nor does it exempt them from such taxes. Jones County Sch. Dist. v. Miss. Dep't of Revenue, 111 So. 3d 588 (Miss. 2013).





# **TITLE 1**

## **LAWS AND STATUTES**

### **CHAPTER 3**

#### **Construction of Statutes**

#### **§ 1-3-21. Infant.**

##### **JUDICIAL DECISIONS**

##### **1. In general.**

Plaintiff's tort action based on events that occurred when he was 19 years old was timely as it was filed less than three years after his 21st birthday; removal of the disability of minority did not arise automatically upon the occurrence of

specified events except for reaching the age of 21, and thus, plaintiff's emancipation did not trigger the automatic removal of disability of minority. *Baker v. RR Brink Locking Sys.*, 721 F.3d 716 (5th Cir. 2013).

#### **§ 1-3-27. Minor.**

##### **JUDICIAL DECISIONS**

##### **2. Child support.**

Chancery court did not abuse its discretion by declining to require a parent to provide post-majority financial support for the parent's child because Mississippi law did not vest the court with the authority to mandate that parents financially

support their offspring post-majority. The duty imposed for a parent to support its child does not extend beyond the child's minority, which terminates when the child reaches twenty-one years of age. *Hays v. Alexander*, 114 So. 3d 704 (Miss. 2013).

#### **§ 1-3-39. Person.**

##### **JUDICIAL DECISIONS**

##### **1. In general.**

Miss. Code Ann. §§ 27-25-501(h) and 27-25-701(i) show that a different meaning of "person" than that contained in Miss. Code Ann. § 1-3-39 was intended for

the purposes of oil and gas severance taxation. *Jones County Sch. Dist. v. Miss. Dep't of Revenue*, 111 So. 3d 588 (Miss. 2013).



# TITLE 9

## COURTS

Chapter 7.	Circuit Courts .....	9-7-1
Chapter 9.	County Courts .....	9-9-1

### CHAPTER 1

#### Provisions Common to Courts

#### GENERAL PROVISIONS

#### § 9-1-41. Reasonableness of attorneys' fees; evidence.

#### JUDICIAL DECISIONS

1. In general.
2. Application.

##### 1. In general.

In a case where there are many billable hours that the trial court is unable to observe or lacks knowledge of, it is incumbent upon the party requesting attorney fees to place before the trial court evidence as to the reasonableness of the amount of the award, so that the record as a whole can support the award of attorney's fees. *Speights v. Speights*, 126 So. 3d 76 (Miss. Ct. App. 2013).

##### 2. Application.

In a divorce action, the trial court's award of attorneys fees to the wife was not supported by the evidence; although she testified about her lack of income, she did not submit a financial statement to substantiate her inability to pay, and there was no evidence as to the amount or reasonableness of the fees. *Speights v. Speights*, 126 So. 3d 76 (Miss. Ct. App. 2013).

### CHAPTER 7

#### Circuit Courts

Judges, Districts, and Terms of Court .....	9-7-1
---	-------

#### JUDGES, DISTRICTS, AND TERMS OF COURT

SEC.		
9-7-3.	Circuit court districts and terms of court; number of judges; powers and duties of judges.	

#### § 9-7-3. Circuit court districts and terms of court; number of judges; powers and duties of judges.

(1) The state is divided into an appropriate number of circuit court districts severally numbered and comprised of the counties as set forth in the sections which follow. A court to be styled "The Circuit Court of the County of \_\_\_\_\_" shall be held in each county, and within each judicial district of a county having two (2) judicial districts, at least twice a year. From and after

January 1, 1995, the dates upon which court shall be held in circuit court districts consisting of a single county shall be the same dates state agencies and political subdivisions are open for business excluding legal holidays. The dates upon which terms shall commence and the number of days for which such terms shall continue in circuit court districts consisting of more than one (1) county shall be set by order of the circuit court judge in accordance with the provisions of subsection (2) of this section. A matter in court may extend past such times if the interest of justice so requires.

(2) An order establishing the commencement and continuation of terms of court for each of the counties within a circuit court district consisting of more than one (1) county shall be entered annually and not later than October 1 of the year immediately preceding the calendar year for which such terms of court are to become effective. Notice of the dates upon which the terms of court shall commence and the number of days for which such terms shall continue in each of the counties within a circuit court district shall be posted in the office of the circuit clerk of each county within the district and mailed to the office of the Secretary of State for publication and distribution to all members of The Mississippi Bar. In the event that an order is not timely entered as herein provided, the terms of court for each of the counties within any such circuit court district shall remain unchanged for the next calendar year. A certified copy of any order entered under the provisions of this subsection shall, immediately upon the entry thereof, be delivered to the clerk of the board of supervisors in each of the counties within the circuit court district.

(3) The number of judges in each circuit court district shall be determined by the Legislature based upon the following criteria:

- (a) The population of the district;
- (b) The number of cases filed in the district;
- (c) The case load of each judge in the district;
- (d) The geographic area of the district;
- (e) An analysis of the needs of the district by the court personnel of the district; and
- (f) Any other appropriate criteria.

(4) The Judicial College of the University of Mississippi Law Center and the Administrative Office of Courts shall determine the appropriate:

- (a) Specific data to be collected as a basis for applying the above criteria;
- (b) Method of collecting and maintaining the specified data; and
- (c) Method of assimilating the specified data.

(5) In a district having more than one (1) office of circuit judge, there shall be no distinction whatsoever in the powers, duties and emoluments of those offices except that the judge who has been for the longest time continuously a judge of that court or, should no judge have served longer in office than the others, the judge who has been for the longest time a member of The Mississippi Bar, shall be the senior judge. The senior judge shall have the right to assign causes and dockets and to set terms in districts consisting of more than one (1) county. A circuit court judge shall have the right to assign criminal matters to county court as provided in Section 9-9-21.



**SOURCES:** Codes, 1930, § 473; 1942, § 1394; Laws, 1931, ch. 37; Laws, 1934, ch. 180; Laws, 1936, ch. 227; Laws, 1936, 1st Ex. ch. 13; Laws, 1954, ch. 254, § 1; Laws, 1971, ch. 344, § 1; Laws, 1984, ch. 443, § 2; Laws, 1985, ch. 502, § 22; Laws, 1994, ch. 564, § 38; Laws, 2013, ch. 361, § 2, eff October 22, 2013 (the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Right Act of 1965).

**Editor's Note —** The effective date of Chapter 361, Laws of 2013, which amended this section, is “from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended.” However, after the bill was approved, the United States Supreme Court, in the case of *Shelby County v. Holder* (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Because of the *Shelby County* decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. The Supreme Court did not strike down Section 5, so it is still in effect. For that reason, the Mississippi Attorney General's Office submitted Chapter 361, Laws of 2013, to the United States Attorney General, in order to technically meet the requirements of Section 5 and fulfill the condition in the effective date of the bill, which will allow the bill to take effect.

By letter dated October 22, 2013, the United States Attorney General responded that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 361 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 361, so Chapter 361 became effective from and after October 22, 2013, the date of the United States Attorney General's response letter.

## DOCKETS

### § 9-7-171. General docket.

## JUDICIAL DECISIONS

### 1. Compliance.

Circuit clerk adequately complied with Miss. Code Ann. § 9-7-171 and Miss. R. Civ. P. 79 because no evidence was ad-

duced that a docket entry was backdated. In *re Dunn*, — So. 3d —, 2013 Miss. LEXIS 232 (Miss. Feb. 21, 2013).

## CHAPTER 9

### County Courts

SEC.

9-9-21. Jurisdiction.

9-9-35. Circuit judges authorized to assign cases and other court duties to county judges where dockets overcrowded.

9-9-37. Certain counties may establish or abolish court.

### § 9-9-21. Jurisdiction.

(1) The jurisdiction of the county court shall be as follows: It shall have jurisdiction concurrent with the justice court in all matters, civil and criminal

of which the justice court has jurisdiction; and it shall have jurisdiction concurrent with the circuit and chancery courts in all matters of law and equity wherein the amount of value of the thing in controversy shall not exceed, exclusive of costs and interest, the sum of Two Hundred Thousand Dollars (\$200,000.00), and the jurisdiction of the county court shall not be affected by any setoff, counterclaim or cross-bill in such actions where the amount sought to be recovered in such setoff, counterclaim or cross-bill exceeds Two Hundred Thousand Dollars (\$200,000.00). Provided, however, the party filing such setoff, counterclaim or cross-bill which exceeds Two Hundred Thousand Dollars (\$200,000.00) shall give notice to the opposite party or parties as provided in Section 13-3-83, and on motion of all parties filed within twenty (20) days after the filing of such setoff, counterclaim or cross-bill, the county court shall transfer the case to the circuit or chancery court wherein the county court is situated and which would otherwise have jurisdiction. It shall have exclusively the jurisdiction heretofore exercised by the justice court in the following matters and causes: namely, eminent domain, the partition of personal property, and actions of unlawful entry and detainer, provided that the actions of eminent domain and unlawful entry and detainer may be returnable and triable before the judge of said court in vacation. The county court shall have jurisdiction over criminal matters in the county assigned by a judge of the circuit court district in which the county is included.

(2) In the event of the establishment of a county court by an agreement between two (2) or more counties as provided in Section 9-9-3, it shall be lawful for such court sitting in one (1) county to act upon any and all matters of which it has jurisdiction as provided by law arising in the other county under the jurisdiction of said court.

**SOURCES:** Codes, 1930, § 693; 1942, § 1604; Laws, 1926, ch. 131; Laws, 1934, ch. 236; Laws, 1936, ch. 247; Laws, 1948, ch. 236; Laws, 1950, ch. 321; Laws, 1962, ch. 300; Laws, 1964, ch. 322; Laws, 1966, ch. 344, § 1; Laws, 1968, ch. 311, § 1; Laws, 1970, ch. 335, § 1; Laws, 1974, ch. 477, § 2; Laws, 1984, ch. 348; Laws, 1991, ch. 311, § 1; Laws, 1998, ch. 427, § 1; Laws, 2003, ch. 429, § 1; Laws, 2013, ch. 361, § 1, eff October 22, 2013 (the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Right Act of 1965).

**Editor's Note** — The effective date of Chapter 361, Laws of 2013, which amended this section, is “from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended.” However, after the bill was approved, the United States Supreme Court, in the case of *Shelby County v. Holder* (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Because of the *Shelby County* decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. The Supreme Court did not strike down Section 5, so it is still in effect. For that reason, the Mississippi Attorney General's Office submitted Chapter 361, Laws of 2013, to the United States Attorney General, in order to technically meet the requirements of Section 5 and fulfill the condition in the effective date of the bill, which will allow the bill to take effect.



By letter dated October 22, 2013, the United States Attorney General responded that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 361 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 361, so Chapter 361 became effective from and after October 22, 2013, the date of the United States Attorney General's response letter.

### **§ 9-9-35. Circuit judges authorized to assign cases and other court duties to county judges where dockets overcrowded.**

In any county in cases where an overcrowded docket justifies the same, any circuit judge may assign to a county judge in said county only, for hearing and final disposition, any case, cause, hearing or motion, or any proceedings involved in the trial and final disposition thereof.

All orders in said cause, trial or hearing may be signed as follows: "\_\_\_\_\_ County Judge and Acting Circuit Judge by assignment." No special order evidencing said assignment shall be entered on the minutes, except in cases where a county judge is assigned the duty of opening and organizing a court where a grand jury is to be impaneled, in which case an order so assigning the said county judge to act shall be signed and entered on the minutes of the court on the opening day thereof.

No compensation for said services shall be allowed said county judge, neither shall said county judge be compelled to accept any assignment except at his will.

**SOURCES:** Codes, 1942, § 1605.5; Laws, 1962, ch. 303; Laws, 1982, ch. 476, § 3; Laws, 1989, ch. 378, § 4; Laws, 1989, ch. 486, § 2; Laws, 2013, ch. 361, § 3, October 22, 2013 (the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Right Act of 1965).

**Editor's Note** — The effective date of Chapter 361, Laws of 2013, which amended this section, is "from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended." However, after the bill was approved, the United States Supreme Court, in the case of *Shelby County v. Holder* (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Because of the *Shelby County* decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. The Supreme Court did not strike down Section 5, so it is still in effect. For that reason, the Mississippi Attorney General's Office submitted Chapter 361, Laws of 2013, to the United States Attorney General, in order to technically meet the requirements of Section 5 and fulfill the condition in the effective date of the bill, which will allow the bill to take effect.

By letter dated October 22, 2013, the United States Attorney General responded that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 361 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 361, so Chapter 361 became effective from and after October 22, 2013, the date of the United States Attorney General's response letter.



**§ 9-9-37. Certain counties may establish or abolish court.**

(1) From and after July 1, 2013, or the date this section is effectuated under Section 5 of the Voting Rights Act of 1965, whichever is later, in any county not brought within the provisions of this chapter by the terms of Sections 9-9-1 and 9-9-3, and in which a county court is not in existence, on a petition of ten percent (10%) of the qualified electors of such county, addressed to, the board of supervisors, is authorized to determine whether a county court shall be established in the county. If a majority of the board are in favor of a county court, then the board shall so certify to the Secretary of State and the Governor shall then issue a proclamation establishing the county court in the county; and thereafter at the next succeeding meeting of the board of supervisors the board shall call an election for the election of a county judge, and the election shall be conducted in the way and manner now provided by law for holding a special election.

(2)(a) Any county not brought within the provisions of this chapter by the terms of Sections 9-9-1 and 9-9-3 that has a county court established under the provisions of subsection (1) of this section may thereafter come from under this chapter in the manner hereinafter provided. On petition of twenty percent (20%) of the qualified electors of the county, addressed to the board of supervisors of the county, an election shall be called by the board of supervisors and conducted in the way and manner now provided by law for a special election for the purpose of determining whether the county court shall be abolished; and, if the majority vote at the election is in favor of abolishing the county court, then the election commission shall so certify to the Secretary of State. The Governor shall then issue a proclamation declaring that the county court in said county be abolished on the first day of the month next succeeding the election.

(b) If a county court is abolished under the provisions of this subsection (2), the board of supervisors is not authorized to establish a county court within less than two (2) years thereafter.

(3) The salary of the county judge shall be as provided in Section 9-9-11.

**SOURCES:** Codes, 1930, §§ 697, 706; 1942, §§ 1608, 1618; Laws, 1926, ch. 131; Laws, 1932, ch. 200; Laws, 1934, ch. 233; Laws, 1936, ch. 254; Laws, 1946, ch. 370; Laws, 1950, ch. 251; Laws, 1952, ch. 238; Laws, 1954, ch. 230; Laws, 1954, Ex Sess ch. 15; Laws, 1955 Ex. ch. 39, § 1; Laws, 1956, chs. 231, §§ 1, 2, 233; Laws, 1960, ch. 234; Laws, 1966, ch. 345, § 1; Laws, 1968, ch. 311, § 2; Laws, 1970, ch. 402, § 4; Laws, 1971, ch. 495, § 1; Laws, 1985, ch. 502, § 61; Laws, 2013, ch. 383, § 1, eff October 22, 2013 (the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Right Act of 1965)

**Editor's Note** — The effective date of Chapter 383, Laws of 2013, which amended this section, is "from and after the date it is effectuated under Section 5 of the Voting Right Act of 1965, as amended and extended." However, after the bill was approved, the United States Supreme Court, in the case of *Shelby County v. Holder* (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Because of the *Shelby County* decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. The Supreme Court did not strike down Section 5, so it is still in effect. For that reason, the Mississippi Attorney General's Office submitted Chapter 383, Laws of 2013, to the United States Attorney General, in order to technically meet the requirements of Section 5 and fulfill the condition in the effective date of the bill, which will allow the bill to take effect.

By letter dated October 22, 2013, the United States Attorney General responded that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 383 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 383, so Chapter 383 became effective from and after October 22, 2013, the date of the United States Attorney General's response letter.

## CHAPTER 19

### Commission on Judicial Performance

#### § 9-19-29. Privileged character of complaints; immunity from civil suit.

#### JUDICIAL DECISIONS

##### 1. Jurisdiction.

Following dismissal of federal claims, the exercise of supplemental jurisdiction was not warranted over state law claims against the estate of a United States Attorney who disclosed tax returns to a state ethics commission; the claims raised novel

and complex issues of Mississippi immunity law under this section, which had never been applied in any reported decision by Mississippi state courts. *Diaz v. Estate of Lampton*, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 89770 (S.D. Miss. June 26, 2013).





# TITLE 11

## CIVIL PRACTICE AND PROCEDURE

### CHAPTER 1

#### Practice and Procedure Provisions Common to Courts

#### § 11-1-55. Authority to impose condition of additur or remittitur.

##### JUDICIAL DECISIONS

2. Particular cases—Additur.
3. —Remittitur.

##### 2. Particular cases—Additur.

Trial court's finding that a jury could have found that plaintiff's injuries in an automobile accident did not warrant medical treatment over and above what was received at the emergency room supported the denial of additur and did not constitute an abuse of discretion. *Crowell v. Burchfield*, — So. 3d —, 2013 Miss. App. LEXIS 666 (Miss. Ct. App. Oct. 8, 2013).

In a personal injury action involving a rear-end vehicle collision, a trial court did not abuse its discretion by denying a motion for an additur by driver 1, who was in the stopped vehicle, was not an abuse of discretion because while driver 1's medical bills established a presumption that

those bills were reasonable and necessary for the treatment of her injuries, the medical bills were not prima facie evidence that the accident was the proximate cause of driver 1's injuries. *Downs v. Ackerman*, 115 So. 3d 785 (Miss. 2013).

##### 3. —Remittitur.

Because Miss. Code Ann. § 11-1-60(2)(b) does not apply to the verdict, it cannot affect a trial court's application or non-application of remittitur pursuant to Miss. Code Ann. § 11-1-55. Therefore, § 11-1-60(2)(b) does not directly conflict with remittitur (a judicial procedure), and does not violate the Mississippi Constitution's Separation of Powers Clauses, Miss. Const. art. I, §§ 1, 2. *Learmonth v. Sears, Roebuck and Co.*, 710 F.3d 249 (5th Cir. 2013).

#### § 11-1-60. Limitation on noneconomic damages in medical malpractice actions; definitions.

##### JUDICIAL DECISIONS

##### 1. Constitutionality.

Because Miss. Code Ann. § 11-1-60(2)(b) does not apply to the verdict, it cannot affect a trial court's application or non-application of remittitur pursuant to Miss. Code Ann. § 11-1-55. Therefore, § 11-1-60(2)(b) does not directly conflict with remittitur (a judicial procedure), and does not violate the Mississippi Constitution's Separation of Powers Clauses, Miss. Const. art. I, §§ 1, 2. *Learmonth v. Sears, Roebuck and Co.*, 710 F.3d 249 (5th Cir. 2013).

Court's reduction of noneconomic damages awarded by a jury was affirmed because Miss. Code Ann. § 11-1-60(2)(b) was not shown to be in palpable conflict with the right to have a jury alone find the amount of compensatory damages. The common law jury guarantee was not shown to include the right to a judgment equal to the jury's damages finding. *Learmonth v. Sears, Roebuck and Co.*, 710 F.3d 249 (5th Cir. 2013).

**§ 11-1-63. Product liability actions; conditions for liability; what constitutes a defective product.**

**JUDICIAL DECISIONS**

**6. Adequate warnings.**

Where an arrestee died after being tased, the brother's failure to warn claim against the taser company failed because the product warnings explicitly and repeatedly warned of the risks of serious

injury and death, and the brother produced no evidence demonstrating that the warnings the company provided were inadequate. *Williams v. City of Cleveland*, 736 F.3d 684 (5th Cir. 2013).

**§ 11-1-69. Prohibition of hedonic damages in civil actions.**

**JUDICIAL DECISIONS**

**4. Jury instructions.**

In a beneficiary's wrongful death suit against a doctor, the trial court committed reversible error in instructing the jury that it could consider the "value of life" of the decedent in awarding damages be-

cause *Miss. Code Ann. § 11-1-69(2)* stated that in any wrongful death action, there would be no recovery for loss of enjoyment of life caused by death. *Laney v. Vance*, 112 So. 3d 1079 (Miss. 2013).

**CHAPTER 7**

**Practice and Procedure in Circuit Courts**

**IN GENERAL**

**§ 11-7-13. Actions for injuries producing death.**

**JUDICIAL DECISIONS**

**6. Persons entitled to recover.**

Chancery court properly divided insurance settlement proceeds equally among all the wrongful death beneficiaries, which included the decedent's three half-siblings, because with respect to priority

of beneficiaries within the same class, no distinction existed between kindred of whole or half-blood. In re *Estate of Eubanks*, — So. 3d —, 2014 Miss. App. LEXIS 35 (Miss. Ct. App. Jan. 21, 2014).

**§ 11-7-211. Bills of exception may be amended.**

**JUDICIAL DECISIONS**

**2. Illustrative cases.**

Where, in response to appellant's motion to supplement the record, a school board filed an amended bill of exceptions, although appellant had only three days' notice of the proposed amendment, its

motion to strike the amended bill was properly denied because any deficiency in notice did not affect its substantial rights. *Rod Cooke Constr. Co. v. Lamar County Sch. Bd.*, — So. 3d —, 2013 Miss. App. LEXIS 641 (Miss. Ct. App. Oct. 1, 2013).

## CHAPTER 11

## Venue of Actions

## IN GENERAL

**§ 11-11-3. County in which to commence civil actions; dismissal of actions more properly heard in another forum; transfer of action to proper county; factors determining grant of motion to dismiss or transfer.**

## JUDICIAL DECISIONS

4.5 Venue where acts or substantial event occurred.

5. Venue as to corporations.

6. —Where cause of action occurs or accrues.

11. Change of venue in general.

**4.5 Venue where acts or substantial event occurred.**

It was error to deny insureds' motion to transfer venue to Smith County in an insurer's action disputing coverage, as the insurer failed to provide sufficient facts to show that venue was proper in Rankin County because there was no "significant act or omission" or "substantial event causing injury" there; the insureds resided in Smith County, the accident happened there, and any misrepresentations in the policy occurred in Covington County. *Wood v. Safeway Ins. Co.*, 114 So. 3d 714 (Miss. 2013).

**5. Venue as to corporations.**

**6. —Where cause of action occurs or accrues.**

Trial court did not abuse its discretion in transferring venue to Clarke County,

Mississippi pursuant to Miss. Code Ann. § 11-11-3 because a company was a non-resident defendant; thus, venue was appropriate in Clarke County because the substantial alleged act or substantial event causing the injury occurred there, and the subcontractor sought a scheduling order and a trial setting in Clarke County. *Reeves v. Midcontinent Express Pipeline, LLC*, 119 So. 3d 1097 (Miss. Ct. App. 2013).

**11. Change of venue in general.**

Since a chancery court erred in relying upon facts to support its denial of a motion to transfer venue which, even if taken as true, were neither alleged in the complaint nor supported by cognizable evidence, it improperly denied a motion to transfer venue. *Wilkerson v. Goss*, 113 So. 3d 544 (Miss. 2013).



## CHAPTER 15

### Arbitration and Award

#### IN GENERAL

### § 11-15-21. Confirmation of award by court.

#### JUDICIAL DECISIONS

##### 1. In general.

Employer was entitled to confirmation of an arbitration award and for entry of a judgment against a former employee because the employee's failure to file an

action to vacate the arbitration award in a timely manner barred the employee's opposition to the motion. *Wells Fargo Advisors, LLC v. Runnels*, 126 So. 3d 137 (Miss. Ct. App. 2013).

### § 11-15-23. Vacation of award; grounds.

#### JUDICIAL DECISIONS

##### 1. In general.

##### 2. Specific grounds for vacating award.

##### 1. In general.

Circuit judge committed reversible error by denying an employer's motion to confirm an arbitration award and for entry of a judgment because the arbitration award did not fall under any of the four instances that would have allowed the award to be vacated. *Wells Fargo Advisors, LLC v. Runnels*, 126 So. 3d 137 (Miss. Ct. App. 2013).

no room for the application of the Doctrine of Manifest Disregard; even if the arbitrator mistakenly refused to consider parol evidence of a term of a settlement agreement, such error was insufficient to constitute undue means or an exceeding of the arbitrator's powers as required by § 11-15-23. *Robinson v. Henne*, 115 So. 3d 797 (Miss. 2013).

Chancellor erred in setting aside an arbitration award because, although undue means and unresolved issues could be valid reasons for setting aside an award, the chancellor's order failed to articulate any "undue means" utilized or any specific deficiencies with the arbitrators' thorough analysis and valuation methods. *Bailey Brake Farms, Inc. v. Trout*, 116 So. 3d 1064 (Miss. 2013).

##### 2. Specific grounds for vacating award.

Mississippi's statute governing judicial review of arbitrator's decisions, Miss. Code Ann. § 11-15-23 (Rev. 2004), leaves

### § 11-15-27. Motion to vacate or modify award; when made.

#### JUDICIAL DECISIONS

##### 1. In general.

Employer was entitled to confirmation of an arbitration award and for entry of a judgment against a former employee because the employee's failure to file an

action to vacate the arbitration award in a timely manner barred the employee's opposition to the motion. *Wells Fargo Advisors, LLC v. Runnels*, 126 So. 3d 137 (Miss. Ct. App. 2013).

ARBITRATION OF CONTROVERSIES ARISING FROM CONSTRUCTION  
CONTRACTS AND RELATED AGREEMENTS

## § 11-15-133. Vacating arbitration award.

## JUDICIAL DECISIONS

**2. Request to vacate properly denied.**

Denial of a contractor's motion to vacate an arbitration award for a builder under Miss. Code Ann. § 11-15-133(1) was proper as: (1) the arbitrator properly refused to postpone the arbitration hearing after the contractor obtained new counsel because the contractor had already caused substantial delay in the proceedings; (2) three separate scheduling hearings were held prior to arbitration due to the con-

tractor's failure to cooperate; (3) obtaining new counsel merely five days before arbitration was scheduled was yet another effort by the contractor to further delay the proceedings; and (4) the arbitrator was well within his authority to exclude the documentary evidence due to the contractor's failure to present the evidence in a timely manner. *Tri County Contrs., Inc. v. Better Quality Builders, LLC*, 111 So. 3d 1285 (Miss. Ct. App. 2013).

## CHAPTER 17

## Suits to Confirm Title or Interest and to Remove Clouds on Title

## § 11-17-35. Title of complainant must be deraigned—and decrees, in certain cases, recorded as deeds.

## JUDICIAL DECISIONS

**2. Necessity of deraigning title.**

Even if it were true that a chancellor erred in excluding deeds from a property owner's predecessors in a boundary line dispute case, the error was harmless be-

cause the deeds were not relevant as the chancellor ultimately relied on a survey. *Mize v. Westbrook Constr. Co. of Oxford, LLC*, — So. 3d —, 2013 Miss. App. LEXIS 432 (Miss. Ct. App. July 16, 2013).

## CHAPTER 21

## Partition of Property

## REALTY

## § 11-21-9. Controverted title and all equities disposed of.

## JUDICIAL DECISIONS

**2. Rights of parties.**

Chancery court did not err in determining a sister was not entitled to recover a setoff for rent on a home she co-owned with her brother in which the brother lived because the sister had not previously

sought rent from her brother when she was not living in the house, but the brother was entitled to a setoff for the house expenses the sister had not paid after she moved out; the sister had paid house expenses from the time she ac-

quired the home with her brother until she moved out. *Stennis v. Stennis*, 109 So. 3d 1107 (Miss. Ct. App. 2013).

## CHAPTER 27

### Eminent Domain

#### IN GENERAL

### § 11-27-5. Complaint to condemn; parties; preference.

#### JUDICIAL DECISIONS

##### I. Under Current Law.

Warranty deed which was filed in the wrong judicial district was void as to a utility because the utility acquired its interest to the subject real property in a

quick-take condemnation action without notice of the misfiled deed. *Harrison County Util. Auth. v. Walker*, — So. 3d —, 2014 Miss. App. LEXIS 19 (Miss. Ct. App. Jan. 14, 2014).

### § 11-27-15. Dismissal; grounds; appeal.

#### JUDICIAL DECISIONS

##### 1. In general.

Warranty deed which was filed in the wrong judicial district was void as to a utility because the utility acquired its interest to the subject real property in a

quick-take condemnation action without notice of the misfiled deed. *Harrison County Util. Auth. v. Walker*, — So. 3d —, 2014 Miss. App. LEXIS 19 (Miss. Ct. App. Jan. 14, 2014).

### § 11-27-19. Evidence of value; award and interest.

#### JUDICIAL DECISIONS

##### 1. In general.

Owner was properly awarded eight percent interest from the date the petition to condemn was filed, rather than from the date a law firm improperly filed a lis

pendens. *Lehman v. Miss. Transp. Comm'n*, 127 So. 3d 277 (Miss. Ct. App. 2013), writ of certiorari denied by 127 So. 3d 1115, 2013 Miss. LEXIS 658 (Miss. Ct. App. 2013).

### § 11-27-37. Right of action for expenses.

#### JUDICIAL DECISIONS

##### 1. In general.

Trial court erred by awarding a landowner attorney's fees when the court dismissed a quick-take condemnation action

because the court erred in dismissing the case. *Harrison County Util. Auth. v. Walker*, — So. 3d —, 2014 Miss. App. LEXIS 19 (Miss. Ct. App. Jan. 14, 2014).



RIGHT TO IMMEDIATE POSSESSION

§ 11-27-87. Effect of insufficiency or excess of deposit.

JUDICIAL DECISIONS

1. In general.

Owner was properly awarded eight percent interest from the date the petition to condemn was filed, rather than from the date a law firm improperly filed a lis pendens. *Lehman v. Miss. Transp. Comm'n*, 127 So. 3d 277 (Miss. Ct. App. 2013), writ of certiorari denied by 127 So. 3d 1115, 2013 Miss. LEXIS 658 (Miss. 2013).

CHAPTER 35

Garnishment

§ 11-35-47. Contest of garnishee's answer by defendant.

JUDICIAL DECISIONS

1. In general.

Circuit court had authority to add a former husband to the garnishment proceeding between his former wife and his employer because the husband possessed a sufficient interest to be joined; the husband's personal property was under the employer's control, and he asserted that the wife obtained title and possession to that property through fraudulent misrepresentation. *Cooper v. Estate of Gatwood*, 119 So. 3d 1031 (Miss. 2013).

CHAPTER 37

Replevin

§ 11-37-101. How replevin commenced; immediate seizure of property sought.

JUDICIAL DECISIONS

1. In general.
2. Applicability.

1. In general.

Trial court acted within its authority in ruling on a tenant's unlawful-reentry issue against a landlord because the tenant's claims against both the towing company which removed vehicles from the tenant's leased premises and the landlord stemmed from the landlord's action in using self-help to have the vehicles removed. *Crowell v. Butts*, — So. 3d —, 2013 Miss. App. LEXIS 866 (Miss. Ct. App. Dec. 10, 2013).

Because issues regarding the possessory rights of the parties remained unresolved, remand for a new trial on the merits was warranted to determine which party had a superior possessory right, under Miss. Code Ann. §§ 11-37-101 and 85-7-251, to vehicles which a towing company towed from an auto repairman's leased premises at the landlord's direction. *Crowell v. Butts*, — So. 3d —, 2013 Miss. App. LEXIS 866 (Miss. Ct. App. Dec. 10, 2013).

Tenant, who operated an auto repair business on leased premises, met the statutory requirements to maintain a re-

plevin action against the towing company for the return of the tenant's vehicles, when the towing company removed and stored the vehicles at the landlord's direction. Further, the tenant, who claimed possession of the vehicles under the theory of bailment, was not required to show title ownership of the vehicles or a written and documented mechanic's lien. *Crowell v. Butts*, — So. 3d —, 2013 Miss. App. LEXIS 866 (Miss. Ct. App. Dec. 10, 2013).

**2. Applicability.**

Bond requirement of Miss. Code Ann. § 11-37-101 did not apply because a loan

servicer commenced its action under Miss. Code Ann. § 11-37-131 and did not seek immediate possession of the borrowers' recreational vehicle. Thus, the circuit court was under no statutory requirement to set a bond amount or require the loan servicer to post bond when it issued its third final judgment awarding the loan servicer possession of the vehicle. *Lacoste v. Sys. & Servs. Techs.*, 126 So. 3d 111 (Miss. Ct. App. 2013).

**§ 11-37-131. How replevin commenced—immediate seizure of property not sought.**

**JUDICIAL DECISIONS**

**2. Bond.**

Bond requirement of Miss. Code Ann. § 11-37-101 did not apply because a loan servicer commenced its action under Miss. Code Ann. § 11-37-131 and did not seek immediate possession of the borrowers' recreational vehicle. Thus, the circuit

court was under no statutory requirement to set a bond amount or require the loan servicer to post bond when it issued its third final judgment awarding the loan servicer possession of the vehicle. *Lacoste v. Sys. & Servs. Techs.*, 126 So. 3d 111 (Miss. Ct. App. 2013).

**§ 11-37-145. Replevin actions to be treated as preference cases.**

**JUDICIAL DECISIONS**

**1. Summary judgment.**

Summary judgment was an appropriate means to determine the possessory rights to a recreational vehicle because the judge's use of Miss. R. Civ. P. 56 supplemented — and was not inconsistent with

— the requirement under Miss. Code Ann. § 11-37-145 that replevins be resolved as early as possible. *Lacoste v. Sys. & Servs. Techs.*, 126 So. 3d 111 (Miss. Ct. App. 2013).

**§ 11-37-157. Replevin cumulative and additional to all other actions.**

**JUDICIAL DECISIONS**

**1. Attorney's fees.**

Because a loan servicer's right to attorney's fees under the terms of a loan agreement was in addition to its right to possess the borrowers' recreational vehicle,

the loan servicer did not have to prove it was entitled to punitive damages to be awarded attorney's fees. *Lacoste v. Sys. & Servs. Techs.*, 126 So. 3d 111 (Miss. Ct. App. 2013).

## CHAPTER 44

## Compensation to Victims of Wrongful Conviction and Imprisonment

## § 11-44-7. Determination of eligibility for compensation; award of compensation.

## JUDICIAL DECISIONS

3. Conviction held proper.
4. Evidence; admissibility.
5. Evidence; sufficiency.
6. No right to jury trial.

**3. Conviction held proper.**

Appellant's suit against the State for wrongful conviction and imprisonment for possession of a firearm by a convicted felon was properly dismissed. His claim that the firearm was inoperable was unavailing because he offered no evidence that it could not be readily converted to expel a projectile, and Miss. Code Ann. § 97-37-5(1) did not require the State to prove that it was operable at the time of his arrest. *Hymes v. State*, 121 So. 3d 938 (Miss. Ct. App. 2013).

**4. Evidence; admissibility.**

Appellant claimed that in his wrongful conviction and imprisonment suit, the trial court erred in admitting his co-defendant's prior testimony under Miss. R. Evid. 804(b)(1), because appellant's counsel in the criminal trial was ineffective in cross-examining that witness. This claim

failed because appellant, in his criminal appeal based on ineffective assistance, never objected to his attorney's cross-examination of this witness. *Hymes v. State*, 121 So. 3d 938 (Miss. Ct. App. 2013).

**5. Evidence; sufficiency.**

Appellant's suit against the State alleging wrongful conviction and imprisonment was properly dismissed because he failed to present sufficient evidence to demonstrate that he did not constructively possess any of the marijuana recovered from his co-defendant's vehicle. *Hymes v. State*, 121 So. 3d 938 (Miss. Ct. App. 2013).

**6. No right to jury trial.**

Appellant was not entitled to a jury trial in his suit against the State alleging wrongful conviction and imprisonment, because the right to a jury trial under Miss. Const. art. III, § 31 applies only to those cases in which a jury trial was necessary at common law, and at common law, sovereign immunity prevented citizens from suing the State. *Hymes v. State*, 121 So. 3d 938 (Miss. Ct. App. 2013).

## CHAPTER 46

## Immunity of State and Political Subdivisions From Liability and Suit for Torts and Torts of Employees

## § 11-46-1. Definitions.

## JUDICIAL DECISIONS

**5. Political subdivision.**

School district constitutes a governmental entity and a political subdivision pursuant to the Mississippi Torts Claims Act,

Miss. Code Ann. § 11-46-1 et seq. *Swindle v. Neshoba County Sch. Dist.*, — So. 3d —, 2013 Miss. App. LEXIS 574 (Miss. Ct. App. Sept. 10, 2013).



## § 11-46-3. Declaration of legislative intent.

## JUDICIAL DECISIONS

## 1. In general.

Mississippi Torts Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., serves to provide immunity from suit to the State of Mississippi and its political subdivisions; however, the MTCA waives immunity for claims for money damages arising

out of the torts of government entities and employees while acting within the course and scope of their employment to the extent set forth in the MTCA. *Swindle v. Neshoba County Sch. Dist.*, — So. 3d —, 2013 Miss. App. LEXIS 574 (Miss. Ct. App. Sept. 10, 2013).

## § 11-46-5. Waiver of immunity; course and scope of employment; presumptions.

## JUDICIAL DECISIONS

## 1. In general.

## 2. Applicability of waiver.

## 3. Course and scope of employment.

## 1. In general.

Mississippi Torts Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., serves to provide immunity from suit to the State of Mississippi and its political subdivisions; however, the MTCA waives immunity for claims for money damages arising out of the torts of government entities and employees while acting within the course and scope of their employment to the extent set forth in the MTCA. *Swindle v. Neshoba County Sch. Dist.*, — So. 3d —, 2013 Miss. App. LEXIS 574 (Miss. Ct. App. Sept. 10, 2013).

## 2. Applicability of waiver.

To the extent the parents' and student's claim for intentional infliction of emotional distress (as a result of alleged repeated failure to protect the student from bullying) is based on malicious conduct, it

was not barred by the Mississippi Tort Claims Act as to the individual school district officials and immunity was not waived as to the school district. *R.S. v. Starkville Sch. Dist.*, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 134264 (N.D. Miss. Sept. 19, 2013).

## 3. Course and scope of employment.

In a case in which property owners alleged that a county supervisor, a contractor, and a subcontractor engaged in a scheme to profit from a debris-removal contract between a county and the contractor by not paying the property owners for providing a dumpsite, the property owners were not required to give the county supervisor notice of their claims because the property owners alleged that the county supervisor's conduct amounted to fraud and malice and such conduct was outside the scope of the county supervisor's employment. *Bradley v. Kelley Bros. Contrs., Inc.*, 117 So. 3d 331 (Miss. Ct. App. 2013).

**§ 11-46-7. Exclusiveness of remedy; joinder of government employee; immunity for acts or omissions occurring within course and scope of employee's duties; provision of defense for and payment of judgments or settlements of claims against employees; contribution or indemnification by employee.**

**JUDICIAL DECISIONS**

3. Course and scope of duties.
4. Applicability.

**3. Course and scope of duties.**

Employee of a state administrative agency was not personally liable when a claimant alleged that the employee falsely imprisoned the claimant in the lobby of a state office building because the employee was immune from personal liability, under Miss. Code Ann. § 11-46-7(2), in that, at all relevant times, the employee was acting within the course and scope of the employee's employment and was entitled to discretionary immunity, under Miss. Code Ann. § 11-46-9(1)(d). *Bell v. Miss. Dep't of Human Servs.*, 126 So. 3d 999 (Miss. Ct. App. 2013).

Miss. Code Ann. § 37-9-69 applied to alleged ministerial acts of negligent failure to enforce school district policies, failure to respond to a student's bullying by other students, and failure to discipline those bullies, thus, Miss. Cod Ann. § 11-46-9(1)(a), (d)'s discretionary immunity did not bar those claims; finding that the alleged conduct was ministerial rather than discretionary did not remove the absolute personal immunity afforded the individual officials for actions committed within the course and scope of employment. *R.S. v. Starkville Sch. Dist.*, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 134264 (N.D. Miss. Sept. 19, 2013).

In judgment creditors' suit alleging a court clerk's negligence in approving the

judgment debtors' supercedeas bonds prevented the creditors from recovering from the bonds, as the clerk was acting in the course and scope of his employment, he was not personally liable to the creditors; therefore, he was not obligated to indemnify the surety on his performance bond. *Newton County v. State ex rel. Dukes*, — So. 2d —, 2013 Miss. App. LEXIS 332 (Miss. Ct. App. June 4, 2013), writ of certiorari denied by 2014 Miss. LEXIS 8 (Miss. Jan. 9, 2014).

In judgment creditors' suit alleging a court clerk's negligence in approving the judgment debtors' supercedeas bonds prevented the creditors from recovering from the bonds, as the clerk was acting in the course and scope of his employment when he approved the bonds, he and the county were immune from liability. *Newton County v. State ex rel. Dukes*, — So. 2d —, 2013 Miss. App. LEXIS 332 (Miss. Ct. App. June 4, 2013), writ of certiorari denied by 2014 Miss. LEXIS 8 (Miss. Jan. 9, 2014).

**4. Applicability.**

Mississippi Torts Claims Act, Miss. Code Ann. § 11-46-1 et seq., provides the exclusive remedy against a governmental entity or its employee for the act or omission which has given rise to a suit. *Swindle v. Neshoba County Sch. Dist.*, — So. 3d —, 2013 Miss. App. LEXIS 574 (Miss. Ct. App. Sept. 10, 2013).

## § 11-46-9. Exemption of governmental entity from liability on claims based on specified circumstances.

### JUDICIAL DECISIONS

6. Discretionary functions.
- 6.5. Ministerial duty.
- 7.5. Immunity.
- 7.6. Waiver of immunity.
8. Illustrative cases.

#### 6. Discretionary functions.

Employee of a state administrative agency was not personally liable when a claimant alleged that the employee falsely imprisoned the claimant in the lobby of a state office building because the employee was immune from personal liability, under Miss. Code Ann. § 11-46-7(2), in that, at all relevant times, the employee was acting within the course and scope of the employee's employment and was entitled to discretionary immunity, under Miss. Code Ann. § 11-46-9(1)(d). *Bell v. Miss. Dep't of Human Servs.*, 126 So. 3d 999 (Miss. Ct. App. 2013).

School district was immune from liability regarding a student's tort claims because the decision by the school district's employees to deny the student permission to go to a rest room during a test was a discretionary function subject to immunity. *Harris v. Bd. of Trustees of the Clinton Public Sch. Dist.*, 126 So. 3d 100 (Miss. Ct. App. 2013).

#### 6.5. Ministerial duty.

Miss. Code Ann. § 37-9-69 applied to alleged ministerial acts of negligent failure to enforce school district policies, failure to respond to a student's bullying by other students, and failure to discipline those bullies, thus, Miss. Cod Ann. § 11-46-9(1)(a), (d)'s discretionary immunity did not bar those claims. *R.S. v. Starkville Sch. Dist.*, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 134264 (N.D. Miss. Sept. 19, 2013).

#### 7.5. Immunity.

Under the Mississippi Tort Claims Act (MTCA), it was the function of a governmental entity—not the acts performed in order to achieve that function—to which immunity did or did not ascribe under the

MTCA. Pursuant to the Montgomery decision, the line of cases holding otherwise was overruled; the Supreme Court of Mississippi holds that, where a statute mandates the government or its employees to act, all acts fulfilling that duty are considered mandated as well, and neither the government nor its employees enjoys immunity. *Little v. Miss. DOT*, — So. 3d —, 2013 Miss. LEXIS 551 (Miss. Oct. 17, 2013).

Commissioner of the state department of corrections, the community correctional director for the region, and a correctional facility officer who assigned work were entitled to immunity from state law claims brought by an inmate based on injuries sustained when he was subjected to dangerous conditions and contracted tuberculosis while fulfilling the terms of his restitution at a chicken-processing plant. *Jones v. Tyson Foods, Inc.*, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 143376 (N.D. Miss. Oct. 3, 2013).

#### 7.6. Waiver of immunity.

School district was not entitled to an award of summary judgment, based upon governmental immunity under the Mississippi Torts Claims Act, Miss. Code Ann. § 11-46-1 et seq., because, although the school district was immune under Miss. Code Ann. § 11-46-9(1)(d), the school district waived this affirmative defense by actively participating in the litigation process and unreasonably delayed its pursuit of immunity for sixteen months. *Doe v. Rankin County Sch. Dist.*, — So. 3d —, 2013 Miss. App. LEXIS 850 (Miss. Ct. App. Dec. 10, 2013).

#### 8. Illustrative cases.

State administrative agency was not liable when a claimant alleged that an employee of the agency falsely imprisoned the claimant in the lobby of a state office building because the agency was entitled to immunity for its employment of the employee under Miss. Code Ann. §§ 11-46-9(1)(d) and 11-46-9(1)(g). *Bell v. Miss.*



Dep't of Human Servs., 126 So. 3d 999 (Miss. Ct. App. 2013).

Where three drivers appealed the Miss. R. Civ. P. 12(b)(6) dismissal of their claim against the Mississippi Department of Transportation (MDOT) because of discretionary-function immunity under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 65-1-65 required the MDOT to maintain and repair state highways, and the MDOT was not entitled to discretionary-function immunity for failure to properly maintain and repair highways because that function was ministerial. It was the function, not the act, to which the MTCA granted or denied immunity. *Little v. Miss. DOT*, — So. 3d —, 2013 Miss. LEXIS 551 (Miss. Oct. 17, 2013).

Trial court erred in ruling that discretionary immunity under the Mississippi Torts Claims Act, Miss. Code Ann. § 11-46-1 et seq., barred a personal injury action, because a genuine issue of material fact existed as to whether a school

district breached its duty of ordinary care in performing its ministerial duty to maintain discipline and to supervise the students, when one student assaulted another student, as required by the school district's handbook. *Swindle v. Neshoba County Sch. Dist.*, — So. 3d —, 2013 Miss. App. LEXIS 574 (Miss. Ct. App. Sept. 10, 2013).

There was no evidence the City caused or had actual notice of any loose dirt or gravel in the area where the pedestrian fell to support a claim under this section since: (1) there was no evidence that the parks and recreation director did not exercise reasonable care in inspecting the park on his daily inspections; (2) there were no complaints from park visitors about the condition of the ground in the area; and (3) the pedestrian assumed that when her foot hit the loose gravel, the loose gravel made her slip. *Hawkins v. City of Morton*, 119 So. 3d 1104 (Miss. Ct. App. 2013).

## § 11-46-11. Statute of limitations; notice of claim requirements; savings clause in favor of infants and those of unsound mind.

### JUDICIAL DECISIONS

4. Applicability.
10. Discovery rule.
15. Illustrative cases.

#### 4. Applicability.

In a case in which property owners alleged that a county supervisor, a contractor, and a subcontractor engaged in a scheme to profit from a debris-removal contract between a county and the contractor by not paying the property owners for providing a dumpsite, the property owners were not required to give the county supervisor notice of their claims because the property owners alleged that the county supervisor's conduct amounted to fraud and malice and such conduct was outside the scope of the county supervisor's employment. *Bradley v. Kelley Bros. Contrs., Inc.*, 117 So. 3d 331 (Miss. Ct. App. 2013).

Judgment creditors' suit alleging a court clerk's negligence in approving the

judgment debtors' superceadeas bonds prevented the creditors from recovering from the bonds was governed by the Mississippi Tort Claims Act; therefore, the Act's one-year statute of limitations, not the general three-year limitations period, applied. *Newton County v. State ex rel. Dukes*, — So. 2d —, 2013 Miss. App. LEXIS 332 (Miss. Ct. App. June 4, 2013), writ of certiorari denied by 2014 Miss. LEXIS 8 (Miss. Jan. 9, 2014).

#### 10. Discovery rule.

Judgment creditors' suit alleging a court clerk's negligence in approving the judgment debtors' superceadeas bonds prevented the creditors from recovering from the bonds was timely under the Mississippi Tort Claims Act's one-year statute of limitations, because it was filed within a year after judgment was rendered on the bonds. *Newton County v. State ex rel. Dukes*, — So. 2d —, 2013

Miss. App. LEXIS 332 (Miss. Ct. App. June 4, 2013), writ of certiorari denied by 2014 Miss. LEXIS 8 (Miss. Jan. 9, 2014).

### 15. Illustrative cases.

Trial court did not abuse its discretion by determining that no good cause was shown by a property owner in failing to timely serve process on a county under

Miss. R. Civ. P. 4, because the owner made no attempt to obtain an extension of time to serve process on the county. *Sturdivant v. Moore Bayou Water Ass'n*, — So. 3d —, 2013 Miss. App. LEXIS 493 (Miss. Ct. App. Aug. 13, 2013), writ of certiorari denied by 2014 Miss. LEXIS 81 (Miss. Jan. 30, 2014).

## § 11-46-13. Jurisdiction; appeals; venue.

### JUDICIAL DECISIONS

#### 2. Venue.

Trial court erred in denying the Mississippi Department of Human Services' (MDHS's) motion for a change of venue, because the venue for suits against MDHS was in the county in which its negligence occurred, and plaintiff alleged no facts

showing that any negligent decisions by MDHS occurred in the county where she filed suit, which was where MDHS had its headquarters. *Miss. Dep't of Human Servs. v. S.C.*, 119 So. 3d 1011 (Miss. 2013).

### CHAPTER 51

#### Appeals

## § 11-51-31. Bond for supersedeas.

### JUDICIAL DECISIONS

#### 2. Bond on supersedeas.

In judgment creditors' suit alleging a court clerk's negligence in approving the judgment debtors' supercedeas bonds prevented the creditors from recovering from the bonds, as the clerk was acting in the course and scope of his employment

when he approved the bonds, he and the county were immune from liability. *Newton County v. State ex rel. Dukes*, — So. 2d —, 2013 Miss. App. LEXIS 332 (Miss. Ct. App. June 4, 2013), writ of certiorari denied by 2014 Miss. LEXIS 8 (Miss. Jan. 9, 2014).

## § 11-51-79. Appeals from the county court.

### JUDICIAL DECISIONS

7. Judgments or orders on appeal.

8. —Trial de novo.

#### 7. Judgments or orders on appeal.

#### 8. —Trial de novo.

Because issues regarding the possessory rights of the parties remained unresolved, remand for a new trial on the merits was warranted to determine which

party had a superior possessory right, under Miss. Code Ann. §§ 11-37-101 and 85-7-251, to vehicles which a towing company towed from an auto repairman's leased premises at the landlord's direction. *Crowell v. Butts*, — So. 3d —, 2013 Miss. App. LEXIS 866 (Miss. Ct. App. Dec. 10, 2013).

**§ 11-51-101. State, county, and municipality, and officials representing them, may appeal without bond; prepayment of costs in lower court; costs of record of trial court.**

### JUDICIAL DECISIONS

#### 2. Particular applications.

Trial court erred in enforcing a supersedeas bond against a city as a surety because the bond did not include two valid sureties or a surety company, and thus, the circuit clerk did not have the authority to receive it or issue supersedeas upon it;

the city was not required to post a bond to stay the judgment and pursue its appeal because it was exempted by statute and procedural rule from the requirement to file a supersedeas bond. *City of Belzoni v. Johnson*, 121 So. 3d 216 (Miss. 2013).

### CHAPTER 53

#### Costs

**§ 11-53-17. Poor persons may sue without security for costs.**

### JUDICIAL DECISIONS

#### 1. In general.

In a premises liability case, plaintiff was not entitled to proceed in forma pauperis on appeal, as any right to proceed in forma pauperis in a civil case existed only

at the trial level. *Davis v. Office Max*, — So. 3d —, 2013 Miss. App. LEXIS 428 (Miss. Ct. App. July 16, 2013), writ of certiorari denied by 2014 Miss. LEXIS 97 (Miss. Feb. 6, 2014).

### CHAPTER 55

#### Litigation Accountability Act of 1988

**§ 11-55-5. Assessment of attorney fees and costs against attorney or party for meritless action, claim or defense, unwarranted delay, or unnecessary proceedings.**

### JUDICIAL DECISIONS

3. Payment of attorneys' fees awarded.
4. Attorneys' fees awarded not excessive.

#### 3. Payment of attorneys' fees awarded.

As appellant failed to serve a complaint on an estate and his claim against the estate was time barred, the trial court did not abuse its discretion in awarding the estate attorneys' fees under Miss. Code Ann. § 11-55-5(1). *Covington v. McDaniel* (In re Estate of Necaise), 126 So. 3d 49 (Miss. Ct. App. 2013), writ of certiorari

denied by 125 So. 3d 658, 2013 Miss. LEXIS 598 (Miss. 2013), writ of certiorari denied by 125 So. 3d 658, 2013 Miss. LEXIS 601 (Miss. 2013), writ of certiorari denied by 125 So. 3d 658, 2013 Miss. LEXIS 610 (Miss. 2013).

#### 4. Attorneys' fees awarded not excessive.

Owner was properly awarded attorneys fees and costs of \$ 32,837.06 for slander of title where a law firm filed lis pendens notices claiming that the land the transportation commission was seeking to con-



demn was of interest in a Louisiana action, when in fact the land had nothing to do with the Louisiana action and the same parties were not involved; the firm stipulated that the \$ 200 per hour rate was

reasonable *Lehman v. Miss. Transp. Comm'n*, 127 So. 3d 277 (Miss. Ct. App. 2013), writ of certiorari denied by 127 So. 3d 1115, 2013 Miss. LEXIS 658 (Miss. 2013).

## CHAPTER 57

### Structured Settlements

#### § 11-57-7. Transfers of structured settlement payment rights.

#### JUDICIAL DECISIONS

1. [Reserved for future use.]
2. Notice of transfer.
3. Transfer deemed ineffective.
4. Court approval of transfer.

#### 1. [Reserved for future use.]

#### 2. Notice of transfer.

Notice of the transfer of structured settlement payment rights under Miss. Code Ann. § 11-5-11(2) requires a return for a date certain similar to the procedure authorized in Miss. R. Civ. P. 81(d)(5); once the original notice is provided to an interested party, notice of subsequent proceedings must comply with Miss. R. Civ. P. 5. *RSL Funding, LLC v. Saucier* (In re Saucier), — So. 3d —, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. Mar. 26, 2013), writ of certiorari denied by 2014 Miss. LEXIS 71 (Miss. Jan. 30, 2014), writ of certiorari denied by 2014 Miss. LEXIS 74 (Miss. Jan. 30, 2014).

#### 3. Transfer deemed ineffective.

As appellant did not provide appellee with the notice required under Miss. Code Ann. 11-57-11(2) of Mississippi's Structured Settlement Protection Act, Miss. Code Ann. §§ 11-57-1 through 11-57-1-15,

appellee's purported transfer to appellant of his rights to receive structured settlement payments was ineffective. *RSL Funding, LLC v. Saucier* (In re Saucier), — So. 3d —, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. Mar. 26, 2013), writ of certiorari denied by 2014 Miss. LEXIS 71 (Miss. Jan. 30, 2014), writ of certiorari denied by 2014 Miss. LEXIS 74 (Miss. Jan. 30, 2014).

#### 4. Court approval of transfer.

Because the Mississippi Structured Settlement Protection Act, Miss. Code Ann. §§ 11-57-1 through 11-57-1-15, requires court approval of a transfer of structured settlement payment rights, a civil action is commenced by filing a complaint with the court; to obtain personal jurisdiction over an interested party, service of process is required consistent with either Miss. R. Civ. P. 4 or 81. *RSL Funding, LLC v. Saucier* (In re Saucier), — So. 3d —, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. Mar. 26, 2013), writ of certiorari denied by 2014 Miss. LEXIS 71 (Miss. Jan. 30, 2014), writ of certiorari denied by 2014 Miss. LEXIS 74 (Miss. Jan. 30, 2014).

#### § 11-57-11. Application for transfer; notification; hearing.

#### JUDICIAL DECISIONS

1. [Reserved for future use.]
2. Notice of transfer.
3. Transfer deemed ineffective.
4. Court approval of transfer.

**1. [Reserved for future use.]****2. Notice of transfer.**

Notice of the transfer of structured settlement payment rights under Miss. Code Ann. § 11-5-11(2) requires a return for a date certain similar to the procedure authorized in Miss. R. Civ. P. 81(d)(5); once the original notice is provided to an interested party, notice of subsequent proceedings must comply with Miss. R. Civ. P. 5. *RSL Funding, LLC v. Saucier* (In re Saucier), — So. 3d —, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. Mar. 26, 2013), writ of certiorari denied by 2014 Miss. LEXIS 71 (Miss. Jan. 30, 2014), writ of certiorari denied by 2014 Miss. LEXIS 74 (Miss. Jan. 30, 2014).

**3. Transfer deemed ineffective.**

As appellant did not provide appellee with the notice required under Miss. Code Ann. 11-57-11(2) of Mississippi's Structured Settlement Protection Act, Miss. Code Ann. §§ 11-57-1 through 11-57-1-15, appellee's purported transfer to appellant of his rights to receive structured settle-

ment payments was ineffective. *RSL Funding, LLC v. Saucier* (In re Saucier), — So. 3d —, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. Mar. 26, 2013), writ of certiorari denied by 2014 Miss. LEXIS 71 (Miss. Jan. 30, 2014), writ of certiorari denied by 2014 Miss. LEXIS 74 (Miss. Jan. 30, 2014).

**4. Court approval of transfer.**

Because the Mississippi Structured Settlement Protection Act, Miss. Code Ann. §§ 11-57-1 through 11-57-1-15, requires court approval of a transfer of structured settlement payment rights, a civil action is commenced by filing a complaint with the court; to obtain personal jurisdiction over an interested party, service of process is required consistent with either Miss. R. Civ. P. 4 or 81. *RSL Funding, LLC v. Saucier* (In re Saucier), — So. 3d —, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. Mar. 26, 2013), writ of certiorari denied by 2014 Miss. LEXIS 71 (Miss. Jan. 30, 2014), writ of certiorari denied by 2014 Miss. LEXIS 74 (Miss. Jan. 30, 2014).





# **TITLE 13**

## **EVIDENCE, PROCESS AND JURIES**

### **CHAPTER 1**

#### **Evidence**

#### **IN GENERAL**

### **§ 13-1-5. Competency of husband and wife.**

#### **JUDICIAL DECISIONS**

2. Construction and application generally.

5. Witness against other spouse.

#### **2. Construction and application generally.**

In a divorce case, the chancellor did not err in allowing the husband's previous wife to testify about the reason for her divorce, as it was relevant to the husband's character and to child custody. She did not testify to any confidential commu-

nications under Miss. Code Ann. § 13-1-5 or Miss. R. Evid. 504. *McNeese v. McNeese*, 119 So. 3d 264 (Miss. 2013).

#### **5. Witness against other spouse.**

Because defense counsel failed to lodge an objection to the husband's testimony against defendant at trial, defendant's claim was barred from review. *Sandlin v. State*, — So. 2d —, 2013 Miss. LEXIS 538 (Miss. Oct. 10, 2013).

### **CHAPTER 3**

#### **Process, Notice, and Publication**

### **§ 13-3-57. Service on nonresident business not qualified to do business in state; survival of cause of action in case of death or inability to act; service on nonresident executor, administrator, etc.**

#### **JUDICIAL DECISIONS**

#### **5. Illustrative cases.**

Out-of-state law firm was subject to personal jurisdiction in Mississippi with respect to claims of legal malpractice and related other issues because firm committed tort against contractor within State of Mississippi, it had sufficient minimum

contacts within State, and traditional notions of fair play and substantial justice were not offended because it purposefully availed itself of benefits and protections of Mississippi law. *Baker & McKenzie, LLP v. Evans*, 123 So. 3d 387 (Miss. 2013).

## CHAPTER 5

### Juries

#### § 13-5-67. Impaneling of alternate jurors.

#### JUDICIAL DECISIONS

##### 2. Application.

Circuit court properly exercised its discretion in excusing a juror who was allegedly sleeping during the presentation of the audio evidence of the victim's interview with the doctor and replacing him with an alternate juror. *Carpenter v. State*, — So. 3d —, 2013 Miss. App. LEXIS 551 (Miss. Ct. App. Sept. 3, 2013).

Trial court did not abuse its discretion in denying defendant's motion for a new trial based upon juror misconduct because a juror testified that she did not have any of information sought during voir dire prior to trial or during voir dire. *Vaughn v. State*, 111 So. 3d 1289 (Miss. Ct. App. 2013).

#### § 13-5-69. Examination of jurors by attorneys or litigants.

#### JUDICIAL DECISIONS

##### 3. Examination as to particular matters.

New trial was not warranted because defendant failed to show that the juror had substantial knowledge of his relation-

ship with the prosecution's witness, which was that of the brother of the prosecution witness's great uncle by marriage. *Walker v. State*, 121 So. 3d 320 (Miss. Ct. App. 2013).

# **TITLE 15**

## **LIMITATIONS OF ACTIONS AND PREVENTION OF FRAUDS**

### **CHAPTER 1**

#### **Limitation of Actions**

#### **§ 15-1-13. Ten years' adverse possession gives title; exceptions.**

##### **JUDICIAL DECISIONS**

12. Property held adversely.

13. —Adjoining tract.

28. Running of limitation period.

##### **12. Property held adversely.**

##### **13. —Adjoining tract.**

Substantial evidence supported a finding of adverse possession because property owners met their burden of proof through privity of possession with their predecessors in the use and maintenance of their properties. *Mize v. Westbrook Constr. Co. of Oxford, LLC*, — So. 3d —, 2013 Miss. App. LEXIS 432 (Miss. Ct. App. July 16, 2013).

##### **28. Running of limitation period.**

In addition to satisfying the other elements for adverse possession, a neighbor was in possession of the disputed property for at least ten years because the neighbor began possessing the disputed 7.79 acres in 1988 when it purchased 482 acres from the previous owner and began conducting various activities as if it rightfully owned the 7.79 acres until 2007, when the abutting landowners erected a fence. *Roberts v. Young's Creek Inv., Inc.*, 118 So. 3d 665 (Miss. Ct. App. 2013).

#### **§ 15-1-35. Limitations applicable to actions for certain torts.**

##### **JUDICIAL DECISIONS**

##### **10. Intentional infliction of emotional distress.**

Where an employee's claim of intentional infliction of emotional distress was based on the same allegations underlying the employee's complaints of employment

discrimination, the claim was time-barred because the complaint was filed more than one year after the employee was terminated. *Fife v. Vicksburg Healthcare, LLC*, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 67748 (S.D. Miss. May 13, 2013).

#### **§ 15-1-49. Limitations applicable to actions not otherwise specifically provided for.**

##### **JUDICIAL DECISIONS**

15. Torts, generally.

23. —Damage to realty.

24. —Malpractice.

39. Particular cases; miscellaneous.

43. —Employment.

##### **15. Torts, generally.**

##### **23. —Damage to realty.**

As the chancellor found that a homeowner's widow first learned of a sinkhole



that damaged their property less than three years before suit was filed, the chancellor did not manifestly err in finding that the complaint was timely filed under the discovery rule. *Borne v. Estate of T. L. Carraway*, 118 So. 3d 571 (Miss. 2013).

#### 24. —Malpractice.

Although an oil company's property became infested with alligators well outside the three-year limitations period for a private nuisance claim filed by the adjoining owners, a fact issue as to whether the infestation should have been discovered prior to the owners' purchase of their property precluded summary judgment where: (1) the owners' property was overgrown; (2) undergrowth could have concealed the alligators; and (3) alligator infestation was an unusual injury that did not put the owners' on notice by an occasional sighting. *Christmas v. Exxon Mobil Corp.*, — So. 3d —, 2013 Miss. App. LEXIS 301 (Miss. Ct. App. May 28, 2013).

Trial court determined that the stockholder knew or should have known of the attorney's alleged legal malpractice on March 10, 2005, when he signed the 2005 buyout agreement. Thus, the three-year limitations period under Miss. Code Ann. § 15-1-49 for filing a legal malpractice claim had expired before the stockholder's complaint was filed on May 13, 2009; therefore, the trial court correctly found that the action was time-barred and correctly granted the attorney's motion for summary judgment. *Evans v. Howell*, 121

So. 3d 919 (Miss. Ct. App. 2013), writ of certiorari denied by 121 So. 3d 918, 2013 Miss. LEXIS 478 (Miss. 2013).

#### 39. Particular cases; miscellaneous.

As appellant failed to file a motion for extension of time to serve an estate until more than 120 days after filing the complaint, and as the statute of limitations (Miss. Code Ann. § 15-1-49) expired thereafter, the trial court did not abuse its discretion in dismissing his suit against the estate with prejudice. *Covington v. McDaniel* (In re Estate of Necaise), 126 So. 3d 49 (Miss. Ct. App. 2013), writ of certiorari denied by 125 So. 3d 658, 2013 Miss. LEXIS 598 (Miss. 2013), writ of certiorari denied by 125 So. 3d 658, 2013 Miss. LEXIS 601 (Miss. 2013), writ of certiorari denied by 125 So. 3d 658, 2013 Miss. LEXIS 610 (Miss. 2013).

#### 43. —Employment.

Chancery court properly ruled that a teacher's claim for relief was barred by the statute of limitations because she failed to refile her complaint in chancery court until she again alleged a breach of contract and sexual discrimination as an original complaint; since the teacher failed to properly perfect an appeal of the school district's decision affirming her termination and to obtain federal ancillary jurisdiction over her state-law claim, no tolling of the statute of limitations occurred. *Lacour v. Claiborne County Sch. Dist.*, 119 So. 3d 1128 (Miss. Ct. App. 2013).

### § 15-1-51. Limitations of suits by and against the state, counties and municipal corporations.

#### JUDICIAL DECISIONS

#### 3. Suits by State and its subdivisions.

Statute of limitations did not apply to a school district's claim for a refund of oil and gas severance taxes because Miss. Const. art. IV, § 104 and Miss. Code Ann.

§ 15-1-51 provided that statutes of limitation in civil causes did not run against the state or its subdivisions. *Jones County Sch. Dist. v. Miss. Dep't of Revenue*, 111 So. 3d 588 (Miss. 2013).

## § 15-1-59. Saving in favor of persons under disabilities.

### JUDICIAL DECISIONS

#### 2. Actions under Tort Claims Act.

Plaintiff's tort action based on events that occurred when he was 19 years old was timely as it was filed less than three years after his 21st birthday; removal of the disability of minority did not arise automatically upon the occurrence of

specified events except for reaching the age of 21, and thus, plaintiff's emancipation did not trigger the automatic removal of disability of minority. *Baker v. RR Brink Locking Sys.*, 721 F.3d 716 (5th Cir. 2013).

## § 15-1-69. Commencement of new action subsequent to abatement or defeat of original action.

### JUDICIAL DECISIONS

#### 6. Action improperly dismissed.

Chancery court properly ruled that a teacher's claim for relief was barred by the statute of limitations because she failed to refile her complaint in chancery court until she again alleged a breach of contract and sexual discrimination as an original complaint; since the teacher failed to

properly perfect an appeal of the school district's decision affirming her termination and to obtain federal ancillary jurisdiction over her state-law claim, no tolling of the statute of limitations occurred. *Lacour v. Claiborne County Sch. Dist.*, 119 So. 3d 1128 (Miss. Ct. App. 2013).

## CHAPTER 3

### Prevention of Frauds

#### ARTICLE 1.

#### IN GENERAL.

## § 15-3-1. Certain contracts to be in writing.

### JUDICIAL DECISIONS

#### 2. Applicability.

#### 3. Oral promises and contracts.

#### 2. Applicability.

Insurance agent's assertion that claims by intended insurance beneficiaries were barred by the statute of frauds because the change of beneficiary was not done in writing and approved, as required, lacked merit because the statute of frauds only affected matters prior to the execution of the contract or policy; as the issue involved the change of beneficiaries after the execution of the policy, the statute was inapplicable. *Strait v. McPhail*, — So. 3d

—, 2013 Miss. App. LEXIS 768 (Miss. Ct. App. Nov. 12, 2013).

#### 3. Oral promises and contracts.

Chapter 13 debtor's claim that he had an oral agreement with a creditor to sell the creditor a company he owned that manufactured and sold bird calls, in exchange for payment of \$250,000 in five \$50,000 increments over five years and the creditor's promise to forgive debts the debtor owed under several promissory notes he signed, was barred by two Mississippi statutes of frauds: Miss. Code Ann. §§ 15-3-1 and 75-2-201. *Ziegler v.*

Hood (In re Hood), — Bankr. —, 2013  
Bankr. LEXIS 3709 (Bankr. N.D. Miss.  
Sept. 3, 2013).



# **TITLE 19**

## **COUNTIES AND COUNTY OFFICERS**

### **CHAPTER 3**

#### **Board of Supervisors**

##### **IN GENERAL**

**§ 19-3-40. Power of board to adopt, modify, alter, or repeal orders, resolutions or ordinances not inconsistent with law.**

##### **JUDICIAL DECISIONS**

**2. No state preemption.**

Forrest County Board of Supervisors had the authority to enact a fencing ordinance under the home rule statute and the ordinance was not preempted by state law since: (1) the Mississippi legislature had not expressly granted the Mississippi Oil and Gas Board (OGB) the exclusive

authority to address industry safety issues: (2) the ordinance was not inconsistent with state oil and gas statutes and regulations; and (3) the OGB had not promulgated any regulation prohibiting perimeter fencing. *Delphi Oil, Inc. v. Forrest County Bd. of Supervisors*, 114 So. 3d 719 (Miss. 2013).

### **CHAPTER 5**

#### **Health, Safety and Public Welfare**

##### **WATER, SEWER, GARBAGE DISPOSAL, AND FIRE PROTECTION DISTRICTS**

**§ 19-5-177. Additional powers of districts.**

##### **JUDICIAL DECISIONS**

**3. Fee for fire protection services.**

Diamondhead Fire Protection District's (DFPD) fee for fire-protection services was permissible since the DFPD provided a valuable service by having fire and other emergency services available to respond to an emergency; the owners' claim that

they received a service from the fire department only if the department responded to an emergency call and that the assessed fees were really for anticipatory services was rejected. *Alfonso v. Diamondhead Fire Prot. Dist.*, 122 So. 3d 54 (Miss. 2013).



# **TITLE 21**

## **MUNICIPALITIES**

### **CHAPTER 19**

#### **Health, Safety, and Welfare**

**§ 21-19-11. Determination that property or parcel of land is menace; notification to property owner; hearing; cleaning private property; cost and penalty as civil debt against property owner; appeal.**

#### **JUDICIAL DECISIONS**

**2. Menace properly found.**

City council's actions in finding a property owner's four properties were a menace were not arbitrary and capricious because the property owner admitted that

his yards were messy and a video clearly showed that the properties were a mess. *Vazzana v. City of Greenville*, 116 So. 3d 1103 (Miss. Ct. App. 2013).





# TITLE 23

## ELECTIONS

Chapter 15.	Mississippi Election Code .....	23-15-1
-------------	---------------------------------	---------

### CHAPTER 15

#### Mississippi Election Code

Article 3.	Voter Registration .....	23-15-11
Article 7.	Election Officials .....	23-15-211
Article 11.	Nominations .....	23-15-291
Article 29.	Election Contests .....	23-15-911

#### ARTICLE 3.

#### VOTER REGISTRATION.

Subarticle F.	Purging.....	23-15-151
---------------	--------------	-----------

#### SUBARTICLE F.

#### PURGING.

SEC.		
23-15-153.	Revision of registration books and pollbooks by commissioners; amount and limitations of per diem payments to commissioners; provision of copies of registration books to municipal registrars; certification of hours worked; number of days in calendar year for which commissioners entitled to receive compensation.	

**§ 23-15-153. Revision of registration books and pollbooks by commissioners; amount and limitations of per diem payments to commissioners; provision of copies of registration books to municipal registrars; certification of hours worked; number of days in calendar year for which commissioners entitled to receive compensation.**

(1) At the following times, the commissioners of election shall meet at the office of the registrar and carefully revise the registration books and the pollbooks of the several voting precincts, and shall erase from those books the names of all persons erroneously on the books, or who have died, removed or become disqualified as electors from any cause; and shall register the names of all persons who have duly applied to be registered and have been illegally denied registration:

(a) On the Tuesday after the second Monday in January 1987 and every following year;

(b) On the first Tuesday in the month immediately preceding the first primary election for congressmen in the years when congressmen are elected;

(c) On the first Monday in the month immediately preceding the first primary election for state, state district legislative, county and county district offices in the years in which those offices are elected; and

(d) On the second Monday of September preceding the general election or regular special election day in years in which a general election is not conducted.

Except for the names of those persons who are duly qualified to vote in the election, no name shall be permitted to remain on the registration books and pollbooks; however, no name shall be erased from the registration books or pollbooks based on a change in the residence of an elector except in accordance with procedures provided for by the National Voter Registration Act of 1993 that are in effect at the time of such erasure. Except as otherwise provided by Section 23-15-573, no person shall vote at any election whose name is not on the pollbook.

(2) Except as provided in this section, and subject to the following annual limitations, the commissioners of election shall be entitled to receive a per diem in the amount of Eighty-four Dollars (\$84.00), to be paid from the county general fund, for every day or period of no less than five (5) hours accumulated over two (2) or more days actually employed in the performance of their duties in the conduct of an election or actually employed in the performance of their duties for the necessary time spent in the revision of the registration books and pollbooks as required in subsection (1) of this section:

(a) In counties having less than fifteen thousand (15,000) residents according to the latest federal decennial census, not more than fifty (50) days per year, with no more than fifteen (15) additional days allowed for the conduct of each election in excess of one (1) occurring in any calendar year;

(b) In counties having fifteen thousand (15,000) residents according to the latest federal decennial census but less than thirty thousand (30,000) residents according to the latest federal decennial census, not more than seventy-five (75) days per year, with no more than twenty-five (25) additional days allowed for the conduct of each election in excess of one (1) occurring in any calendar year;

(c) In counties having thirty thousand (30,000) residents according to the latest federal decennial census but less than seventy thousand (70,000) residents according to the latest federal decennial census, not more than one hundred (100) days per year, with no more than thirty-five (35) additional days allowed for the conduct of each election in excess of one (1) occurring in any calendar year;

(d) In counties having seventy thousand (70,000) residents according to the latest federal decennial census but less than ninety thousand (90,000) residents according to the latest federal decennial census, not more than one hundred twenty-five (125) days per year, with no more than forty-five (45) additional days allowed for the conduct of each election in excess of one (1) occurring in any calendar year;

(e) In counties having ninety thousand (90,000) residents according to the latest federal decennial census but less than one hundred seventy



thousand (170,000) residents according to the latest federal decennial census, not more than one hundred fifty (150) days per year, with no more than fifty-five (55) additional days allowed for the conduct of each election in excess of one (1) occurring in any calendar year;

(f) In counties having one hundred seventy thousand (170,000) residents according to the latest federal decennial census but less than two hundred thousand (200,000) residents according to the latest federal decennial census, not more than one hundred seventy-five (175) days per year, with no more than sixty-five (65) additional days allowed for the conduct of each election in excess of one (1) occurring in any calendar year;

(g) In counties having two hundred thousand (200,000) residents according to the latest federal decennial census but less than two hundred twenty-five thousand (225,000) residents according to the latest federal decennial census, not more than one hundred ninety (190) days per year, with no more than seventy-five (75) additional days allowed for the conduct of each election in excess of one (1) occurring in any calendar year;

(h) In counties having two hundred twenty-five thousand (225,000) residents according to the latest federal decennial census but less than two hundred fifty thousand (250,000) residents according to the latest federal decennial census, not more than two hundred fifteen (215) days per year, with no more than eighty-five (85) additional days allowed for the conduct of each election in excess of one (1) occurring in any calendar year;

(i) In counties having two hundred fifty thousand (250,000) residents according to the latest federal decennial census but less than two hundred seventy-five thousand (275,000) residents according to the latest federal decennial census, not more than two hundred thirty (230) days per year, with no more than ninety-five (95) additional days allowed for the conduct of each election in excess of one (1) occurring in any calendar year;

(j) In counties having two hundred seventy-five thousand (275,000) residents according to the latest federal decennial census or more, not more than two hundred forty (240) days per year, with no more than one hundred five (105) additional days allowed for the conduct of each election in excess of one (1) occurring in any calendar year.

(3) In addition to the number of days authorized in subsection (2) of this section, the board of supervisors of a county may authorize, in its discretion, the commissioners of election to receive a per diem in the amount provided for in subsection (2) of this section, to be paid from the county general fund, for every day or period of no less than five (5) hours accumulated over two (2) or more days actually employed in the performance of their duties in the conduct of an election or actually employed in the performance of their duties for the necessary time spent in the revision of the registration books and pollbooks as required in subsection (1) of this section, for not to exceed five (5) days.

(4)(a) The commissioners of election shall be entitled to receive a per diem in the amount of Eighty-four Dollars (\$84.00), to be paid from the county general fund, not to exceed ten (10) days for every day or period of no less than five (5) hours accumulated over two (2) or more days actually employed

in the performance of their duties for the necessary time spent in the revision of the registration books and pollbooks prior to any special election. For purposes of this paragraph, the regular special election day shall not be considered a special election. The annual limitations set forth in subsection (2) of this section shall not apply to this paragraph.

(b) The commissioners of election shall be entitled to receive a per diem in the amount of One Hundred Fifty Dollars (\$150.00), to be paid from the county general fund, for the performance of their duties on the day of any general or special election. The annual limitations set forth in subsection (2) of this section shall apply to this paragraph.

(5) The commissioners of election shall be entitled to receive a per diem in the amount of Eighty-four Dollars (\$84.00), to be paid from the county general fund, not to exceed fourteen (14) days for every day or period of no less than five (5) hours accumulated over two (2) or more days actually employed in the performance of their duties for the necessary time spent in the revision of the registration books, pollbooks and in the conduct of a runoff election following either a general or special election.

(6) The commissioners of election shall be entitled to receive only one (1) per diem payment for those days when the commissioners of election discharge more than one (1) duty or responsibility on the same day.

(7) The county registrar shall prepare the pollbooks and the county commissioners of election shall prepare the registration books of each municipality located within the county pursuant to an agreement between the county and each municipality in the county. The county commissioners of election and the county registrar shall be paid by each municipality for the actual cost of preparing registration books and pollbooks for the municipality and shall pay each county commissioner of election a per diem in the amount provided for in subsection (2) of this section for each day or period of not less than five (5) hours accumulated over two (2) or more days the commissioners are actually employed in preparing the registration books for the municipality, not to exceed five (5) days. The county commissioners of election and county registrar shall provide copies of the registration books and pollbooks to the municipal clerk of each municipality in the county. The municipality shall pay the county registrar for preparing and printing the pollbooks. A municipality may secure "read only" access to the Statewide Centralized Voter System and print its own pollbooks using this information; however, county commissioners of election shall remain responsible for preparing registration books for municipalities and shall be paid for this duty in accordance with this subsection.

(8) County commissioners of election who perform the duties of an executive committee with regard to the conduct of a primary election under a written agreement authorized by law to be entered into with an executive committee shall receive per diem as provided for in subsection (2) of this section. The days that county commissioners of election are employed in the conduct of a primary election shall be treated the same as days county commissioners of election are employed in the conduct of other elections.

(9) Every commissioner of election shall sign personally a certification setting forth the number of hours actually worked in the performance of the



commissioner's official duties and for which the commissioner seeks compensation. The certification must be on a form as prescribed in this subsection. The commissioner's signature is, as a matter of law, made under the commissioner's oath of office and under penalties of perjury.

The certification form shall be as follows:

### COUNTY ELECTION COMMISSIONER

#### PER DIEM CLAIM FORM

NAME:  
ADDRESS:  
CITY:

COUNTY:  
DISTRICT:

ZIP:

DATE WORKED	BEGINNING TIME	ENDING TIME	PURPOSE OF WORK	APPLICABLE MS CODE SECTION	ACTUAL HOURS WORKED	PER DIEM DAYS EARNED
----------------	-------------------	----------------	-----------------------	----------------------------------	---------------------------	----------------------------

TOTAL NUMBER OF PER DIEM DAYS EARNED

EXCLUDING ELECTION DAYS

PER DIEM RATE PER DAY EARNED

x 84.00

TOTAL NUMBER PER DIEM DAYS EARNED

FOR ELECTION DAYS

PER DIEM RATE PER DAY EARNED

x 150.00

TOTAL AMOUNT OF PER DIEM CLAIMED

\$ \_\_\_\_\_

I understand that I am signing this document under my oath as a commissioner of election and under penalties of perjury.

I understand that I am requesting payment from taxpayer funds and that I have an obligation to be specific and truthful as to the amount of hours worked and the compensation I am requesting.

Signed this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Commissioner's Signature

When properly completed and signed, the certification must be filed with the clerk of the county board of supervisors before any payment may be made. The certification will be a public record available for inspection and reproduction immediately upon the oral or written request of any person.

Any person may contest the accuracy of the certification in any respect by notifying the chairman of the commission, any member of the board of supervisors or the clerk of the board of supervisors of such contest at any time before or after payment is made. If the contest is made before payment is made, no payment shall be made as to the contested certificate until the contest is finally disposed of. The person filing the contest shall be entitled to a full hearing, and the clerk of the board of supervisors shall issue subpoenas upon request of the contestor compelling the attendance of witnesses and production of documents and things. The contestor shall have the right to appeal de novo



to the circuit court of the involved county, which appeal must be perfected within thirty (30) days from a final decision of the commission, the clerk of the board of supervisors or the board of supervisors, as the case may be.

Any contestor who successfully contests any certification will be awarded all expenses incident to his contest, together with reasonable attorney's fees, which will be awarded upon petition to the chancery court of the involved county upon final disposition of the contest before the election commission, board of supervisors, clerk of the board of supervisors, or, in case of an appeal, final disposition by the court. The commissioner against whom the contest is decided shall be liable for the payment of the expenses and attorney's fees, and the county shall be jointly and severally liable for same.

(10) Any commissioner of election who has not received a certificate issued by the Secretary of State pursuant to Section 23-15-211 indicating that the commissioner of election has received the required elections seminar instruction and that the commissioner of election is fully qualified to conduct an election, shall not receive any compensation authorized by this section, Section 23-15-491 or Section 23-15-239.

**SOURCES:** Derived from 1972 Code § 23-5-79 [Codes, 1880, § 124; 1892, § 3635; 1906, § 4142; Hemingway's 1917, § 6776; 1930, § 6211; 1942, § 3239; Laws, 1968, ch. 570, § 1; Laws, 1970, ch. 506, § 24; Laws, 1979, ch. 487, § 1; Laws, 1983, ch. 423, §§ 1, 4; repealed by Laws, 1986, ch. 495, § 335]; en, Laws, 1986, ch. 495, § 43; Laws, 1987, ch. 499, § 15; Laws, 1988, ch. 389, § 1; Laws, 1993, ch. 510, § 1; Laws, 1994, ch. 590, § 2; Laws, 2000, ch. 430, § 4; Laws, 2001, ch. 414, § 1; Laws, 2002, ch. 444, § 1; Laws, 2004, ch. 305, § 12; Laws, 2006, ch. 592, § 2; Laws, 2007, ch. 434, § 4; Laws, 2010, ch. 377, § 1; Laws, 2013, ch. 413, § 1; Laws, 2013, ch. 456, § 1, eff July 18, 2013 (the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Rights Act of 1965.)

**Editor's Note** — This section was amended by two bills in 2013. The effective date of each of the two bills that amended this section, Chapter 413, Laws of 2013 (Senate Bill No. 2238) and Chapter 456, Laws of 2013 (Senate Bill No. 2311), is “from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended.” However, after the bills were approved, the United States Supreme Court, in the case of *Shelby County v. Holder* (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Because of the *Shelby County* decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. The Supreme Court did not strike down Section 5, so it is still in effect. Chapter 413 was submitted to the United States Attorney General before the *Shelby County* decision was rendered. In a letter dated July 9, 2013, the United States Attorney General responded that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 413 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 413, so Chapter 413 became effective on the date of the response letter from the United States Attorney General, July 9, 2013.

Chapter 456 was not submitted before the *Shelby County* decision, but the Mississippi Attorney General's Office submitted Chapter 456 to the United States Attorney

General in order to technically meet the requirements of Section 5 and fulfill the condition in the effective date of the bill, which will allow the bill to take effect.

By letter dated July 18, 2013, the United States Attorney General responded that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 456 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 456, so Chapter 456 became effective from and after July 18, 2013, the date of the United States Attorney General's response letter. The Joint Committee on Compilation, Revision and Publication of Legislation, in its meeting on August 1, 2013, voted to integrate the amendments to this section by Chapter 413 and Chapter 456.

## ARTICLE 7.

### ELECTION OFFICIALS.

SEC.

- 23-15-217. County election commissioner authorized to be candidate for other office; resignation from office; duties and powers of board of supervisors where election of county election commissioner is contested.
- 23-15-227. Compensation of managers, clerks and other persons generally.

### **§ 23-15-217. County election commissioner authorized to be candidate for other office; resignation from office; duties and powers of board of supervisors where election of county election commissioner is contested.**

(1) A commissioner of election of any county may be a candidate for any other office at any election held or to be held during the four-year term for which he or she has been elected to the office of commissioner of election or with reference to which he or she has acted as such; provided that he or she has resigned from the office of election commissioner before he or she qualifies for the office which he or she desires to seek.

(2) In any case involving the election of a county election commissioner wherein there is a contest of any nature, including, but not limited to, the right of any person to vote or the counting of any challenge ballot, all the duties and powers of the commission in connection with said contest shall be performed by the board of supervisors, as is contemplated by Section 23-15-215 in cases where there are no commissioners of election in the county.

**SOURCES:** Derived from 1972 Code §§ 23-5-95 [Codes, 1871, § 342; 1880, § 122; 1892, § 3634; 1906, § 4141; Hemingway's 1917, § 6775; 1930, § 6213; 1942, § 3242; Laws, 1968, ch. 568, § 3; repealed by Laws, 1986, ch. 495, § 331]; en, Laws, 1986, ch. 495, § 57; Laws, 1989, ch. 483, § 1; Laws, 1991, ch. 613, § 1; Laws, 2003, ch. 447, § 1; Laws, 2013, ch. 474, § 1, eff July 18, 2013 (the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Rights Act of 1965).

**Editor's Note** — The effective date of Chapter 474, Laws of 2013, which amended this section, is "from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended." However, after the bill was approved, the United States Supreme Court, in the case of *Shelby County v. Holder* (June 25,



2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Because of the *Shelby County* decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. The Supreme Court did not strike down Section 5, so it is still in effect. For that reason, the Mississippi Attorney General's Office submitted Chapter 474, Laws of 2013, to the United States Attorney General, in order to technically meet the requirements of Section 5 and fulfill the condition in the effective date of the bill, which will allow the bill to take effect.

By letter dated July 18, 2013, the United States Attorney General responded that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 474 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 474, so Chapter 474 became effective from and after July 18, 2013, the date of the United States Attorney General's response letter.

### **§ 23-15-227. Compensation of managers, clerks and other persons generally.**

(1) The managers and clerks shall be each entitled to Seventy-five Dollars (\$75.00) for each election; however, the board of supervisors may, in its discretion, pay the managers and clerks an additional amount not to exceed Fifty Dollars (\$50.00) per election.

(2) The manager or other person who shall carry to the place of voting, away from the courthouse, the official ballots, ballot boxes, pollbooks and other necessities, shall be allowed Ten Dollars (\$10.00) for each voting precinct for so doing. The manager or other person who acts as returning officer shall be allowed Ten Dollars (\$10.00) for each voting precinct for that service. If a person who performs the duties described in this subsection utilizes a privately owned motor vehicle to perform them, he or she shall receive for each mile actually and necessarily traveled in excess of ten (10) miles, the mileage reimbursement rate allowable to federal employees for the use of a privately owned vehicle while on official travel.

(3) The compensation authorized in this section shall be allowed by the board of supervisors, and shall be payable out of the county treasury.

(4) The compensation provided in this section shall constitute payment in full for the services rendered by the persons named for any election, whether there be one (1) election or issue voted upon, or more than one (1) election or issue voted upon at the same time.

**SOURCES:** Derived from 1972 Code § 23-5-183 [Codes, 1892, § 3706; 1906, § 4213; Hemingway's 1917, § 6849; 1930, § 6257; 1942, § 3286; Laws, 1932, ch. 298; Laws, 1938, ch. 306; Laws, 1950, ch. 281; Laws, 1960, ch. 452, § 1; Laws, 1966 ch. 614, § 1; Laws, 1970, ch. 511, § 1; Laws, 1973, ch. 401 § 1; Laws, 1975, ch. 497, § 2; Laws, 1979, ch. 487, § 3; Laws, 1983, ch. 510; repealed by Laws, 1986, ch. 495, § 335]; en, Laws, 1986, ch. 495, § 62; Laws, 1987, ch. 499, § 16; Laws, 1988 ch. 402, § 1; Laws, 1995, ch. 446, § 1; Laws, 2007, ch. 434, § 5; Laws, 2013, ch. 366, § 1, eff July 17, 2013 (the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Rights Act of 1965).



**Editor's Note** — The effective date of Chapter 366, Laws of 2013, which amended this section, is “from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended.” However, after the bill was approved, the United States Supreme Court, in the case of *Shelby County v. Holder* (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Because of the *Shelby County* decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. The Supreme Court did not strike down Section 5, so it is still in effect. For that reason, the Mississippi Attorney General's Office submitted Chapter 366, Laws of 2013, to the United States Attorney General, in order to technically meet the requirements of Section 5 and fulfill the condition in the effective date of the bill, which will allow the bill to take effect.

By letter dated July 17, 2013, the United States Attorney General responded that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 366 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 366, so Chapter 366 became effective from and after July 17, 2013, the date of the United States Attorney General's response letter.

#### ARTICLE 11.

#### NOMINATIONS.

SEC.

23-15-315. Publication of notice to public.

### § 23-15-315. Publication of notice to public.

The county executive committee chairman shall publish a copy of his call for a meeting in some newspaper published at least once per week in the municipality affected for three (3) weeks preceding the date set for the mass convention, or if there be no newspaper published in the municipality, then in some newspaper having general circulation in the municipality and by posting notices continuously in three (3) public places in the municipality, one (1) of which shall be city hall or be the regular location where the municipal governing authority meets to conduct business not less than three (3) weeks before the date for the mass convention.

**SOURCES:** Derived from 1942 Code § 3155 [Codes, Hemingway's 1917, § 6420; 1930, § 5908; Laws, 1910, ch. 209; repealed by Laws, 1970, ch. 506, § 33, and 1986, ch. 495, § 346]; en, Laws, 1986, ch. 495, § 99; Laws, 2010, ch. 428, § 2; Laws, 2013, ch. 391, § 2, eff August 1, 2013 (the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Rights Act of 1965.)

**Editor's Note** — The effective date of Chapter 391, Laws of 2013, which amended this section, is “from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended.” However, after the bill was approved, the United States Supreme Court, in the case of *Shelby County v. Holder* (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject

to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Because of the *Shelby County* decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. The Supreme Court did not strike down Section 5, so it is still in effect. For that reason, the Mississippi Attorney General’s Office submitted Chapter 391, Laws of 2013, to the United States Attorney General, in order to technically meet the requirements of Section 5 and fulfill the condition in the effective date of the bill, which will allow the bill to take effect.

By letter dated August 1, 2013, the United States Attorney General responded that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 391 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 391, so Chapter 391 became effective from and after August 1, 2013, the date of the United States Attorney General’s response letter.

ARTICLE 29.

ELECTION CONTESTS.

Subarticle C. Contests of Other Elections.....23-15-951  
Subarticle D. Contests of Qualifications of Candidates.....23-15-961

SUBARTICLE B.

CONTESTS OF PRIMARY ELECTIONS.

**§ 23-15-927. Filing of protest and petition in circuit court in event of unreasonable delay by committee; requirement of certificate and cost bond; suspension of committee’s order.**

JUDICIAL DECISIONS

1. In general.

4. Requisites and sufficiency of petition.

1. In general.

Miss. Code Ann. § 23-15-927 did not impermissibly violate separation of powers or Miss. Const. art. 6, § 146; rather, the judicial relief sought under the election code was unique unto itself and established by statute, until the process reached the Mississippi Supreme Court, where procedure was controlled by the Mississippi Rules of Appellate Procedure.
- Jackson v. Bell, 123 So. 3d 436 (Miss. 2013).

4. Requisites and sufficiency of petition.

Special judge erred by dismissing a candidate’s petition for review of a tax commissioner election with prejudice for the nonmerits issue of lack of jurisdiction because she failed to attach two attorney certificates to her petition, as required by Miss. Code Ann. § 23-15-927; dismissal should have been without prejudice. Jackson v. Bell, 123 So. 3d 436 (Miss. 2013).

## SUBARTICLE C.

## CONTESTS OF OTHER ELECTIONS.

SEC.

23-15-951. Filing of petition; designation of judges to hear election contests; trial by, and verdict of, jury; assumption of office.

**§ 23-15-951. Filing of petition; designation of judges to hear election contests; trial by, and verdict of, jury; assumption of office.**

Except as otherwise provided by Section 23-15-955 or 23-15-961, a person desiring to contest the election of another person returned as elected to any office within any county, may, within twenty (20) days after the election, file a petition in the office of the clerk of the circuit court of the county, setting forth the grounds upon which the election is contested. When such a petition is filed, the circuit clerk shall immediately notify, by registered letter, telegraph, telephone, or personally the Chief Justice of the Supreme Court or in his absence, or disability, some other Justice of the Supreme Court, who shall forthwith designate and notify a circuit judge or chancellor of a district other than that which embraces the district, subdistrict, county or any of the counties, involved in the contest or complaint, to proceed to the county in which the contest or complaint has been filed to hear and determine the contest or complaint. The circuit clerk shall also cause a copy of such petition to be served upon the contestee, which shall serve as notice to such contestee.

The Supreme Court shall compile a list of judges throughout the state to hear such disputes before an election. It shall be the official duty of the designated circuit judge or chancellor to proceed to discharge the duty of hearing the contest at the earliest possible date. The date of the contest shall be fixed by the judge or chancellor, and the judge or chancellor shall provide reasonable notice to the contestant and the contestee of the date and time fixed for the contest. The judge or chancellor shall cause the contestant and contestee to be served in a reasonable manner. When the contestee is served, such contestee shall promptly file his answer, and cross-complaint, if the contestee has a cross-complaint.

The court shall, at the first term, cause an issue to be made up and tried by a jury, and the verdict of the jury shall find the person having the greatest number of legal votes at the election. If the jury shall find against the person returned elected, the clerk shall issue a certificate thereof; and the person in whose favor the jury shall find shall be commissioned by the Governor, and shall qualify and enter upon the duties of his office. Each party shall be allowed ten (10) peremptory challenges, and new trials shall be granted and costs awarded as in other cases. In case the election of district attorney or other state district election be contested, the petition may be filed in any county of the district or in any county of an adjoining district within twenty (20) days after the election, and like proceedings shall be had thereon as in the case of county



officers, and the person found to be entitled to the office shall qualify as required by law and enter upon the duties of his office.

A person desiring to contest the election of another person returned as elected to any seat in the Mississippi Legislature shall comply with the provisions of Section 23-15-955. A person desiring to contest the qualifications of a candidate for nomination in a political party primary election shall comply with the provisions of Section 23-15-961.

**SOURCES:** Derived from 1972 Code § 23-5-187 [Codes, Hutchinson's 1848, ch. 7, art 7 (1); 1857, ch. 4, art 23; 1871, § 391; 1880, § 150; 1892, § 3679; 1906, § 4186; Hemingway's 1917, § 6820; 1930, § 6258; 1942, § 3287; repealed by Laws, 1986, ch. 495, § 335]; en, Laws, 1986, ch. 495, § 291; Laws, 1988, ch. 577, § 5; Laws, 1999, ch. 301, § 13; Laws, 2000, ch. 450, § 1; Laws, 2013, ch. 432, § 1, eff October 22, 2013 (the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Rights Act of 1965).

**Editor's Note** — The effective date of Chapter 432, Laws of 2013, which amended this section, is "from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended." However, after the bill was approved, the United States Supreme Court, in the case of *Shelby County v. Holder* (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Because of the *Shelby County* decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. The Supreme Court did not strike down Section 5, so it is still in effect. For that reason, the Mississippi Attorney General's Office submitted Chapter 432, Laws of 2013, to the United States Attorney General, in order to technically meet the requirements of Section 5 and fulfill the condition in the effective date of the bill, which will allow the bill to take effect.

By letter dated October 22, 2013, the United States Attorney General responded that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 432 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 432, so Chapter 432 became effective from and after October 22, 2013, the date of the United States Attorney General's response letter.

#### SUBARTICLE D.

#### CONTESTS OF QUALIFICATIONS OF CANDIDATES.

SEC.

23-15-963. Exclusive procedures for contesting qualifications of candidate for general election; exceptions.

### § 23-15-963. Exclusive procedures for contesting qualifications of candidate for general election; exceptions.

(1) Any person desiring to contest the qualifications of another person who has qualified pursuant to the provisions of Section 23-15-359, Mississippi Code of 1972, as a candidate for any office elected at a general election, shall file a petition specifically setting forth the grounds of the challenge not later

than thirty-one (31) days after the date of the first primary election set forth in Section 23-15-191, Mississippi Code of 1972. Such petition shall be filed with the same body with whom the candidate in question qualified pursuant to Section 23-15-359, Mississippi Code of 1972.

(2) Any person desiring to contest the qualifications of another person who has qualified pursuant to the provisions of Section 23-15-213, Mississippi Code of 1972, as a candidate for county election commissioner elected at a general election, shall file a petition specifically setting forth the grounds of the challenge no later than sixty (60) days prior to the general election. Such petition shall be filed with the county board of supervisors, being the same body with whom the candidate in question qualified pursuant to Section 23-15-213, Mississippi Code of 1972.

(3) Any person desiring to contest the qualifications of another person who has qualified pursuant to the provisions of Section 23-15-361, Mississippi Code of 1972, as a candidate for municipal office elected on the date designated by law for regular municipal elections, shall file a petition specifically setting forth the grounds of the challenge no later than thirty-one (31) days after the date of the first primary election set forth in Section 23-15-309, Mississippi Code of 1972. Such petition shall be filed with the municipal commissioners of election, being the same body with whom the candidate in question qualified pursuant to Section 23-15-361, Mississippi Code of 1972.

(4) Within ten (10) days of receipt of the petition described in subsections (1), (2) and (3) of this section, the appropriate election officials shall meet and rule upon the petition. At least two (2) days before the hearing to consider the petition, the appropriate election officials shall give notice to both the petitioner and the contested candidate of the time and place of the hearing on the petition. Each party shall be given an opportunity to be heard at such meeting and present evidence in support of his position.

(5) If the appropriate election officials fail to rule upon the petition within the time required above, such inaction shall be interpreted as a denial of the request for relief contained in the petition.

(6) Any party aggrieved by the action or inaction of the appropriate election officials may file a petition for judicial review to the circuit court of the county in which the election officials whose decision is being reviewed sits. Such petition must be filed no later than fifteen (15) days after the date the petition was originally filed with the appropriate election officials. Such person filing for judicial review shall give a cost bond in the sum of Three Hundred Dollars (\$300.00) with two (2) or more sufficient sureties conditioned to pay all costs in case his petition be dismissed, and an additional bond may be required, by the court, if necessary, at any subsequent stage of the proceedings.

(7) The circuit court with whom such a petition for judicial review has been filed shall at the earliest possible date set the matter for hearing. Notice shall be given the interested parties of the time set for hearing by the circuit clerk. The hearing before the circuit court shall be de novo. The matter shall be tried to the circuit judge, without a jury. After hearing the evidence, the circuit judge shall determine whether the candidate whose qualifications have been



challenged is legally qualified to have his name placed upon the ballot in question. The circuit judge may, upon disqualification of any such candidate, order that such candidate shall bear the court costs of the proceedings.

(8) Within three (3) days after judgment is rendered by the circuit court, the contestant or contestee, or both, may file an appeal in the Supreme Court upon giving a cost bond in the sum of Three Hundred Dollars (\$300.00), together with a bill of exceptions which shall state the point or points of law at issue with a sufficient synopsis of the facts to fully disclose the bearing and relevancy of such points of law. The bill of exceptions shall be signed by the trial judge, or in case of his absence, refusal or disability, by two (2) disinterested attorneys, as is provided by law in other cases of bills of exception. The filing of such appeals shall automatically suspend the decision of the circuit court and the appropriate election officials are entitled to proceed based upon their decision unless and until the Supreme Court, in its discretion, stays further proceedings in the matter. The appeal shall be immediately docketed in the Supreme Court and referred to the court en banc upon briefs without oral argument unless the court shall call for oral argument, and shall be decided at the earliest possible date, as a preference case over all others. The Supreme Court shall have the authority to grant such relief as is appropriate under the circumstances.

(9) The procedure set forth above shall be the sole and only manner in which the qualifications of a candidate seeking public office who qualified pursuant to the provisions of Sections 23-15-359, 23-15-213 and 23-15-361, Mississippi Code of 1972, may be challenged prior to the time of his election. After any such person has been elected to public office, the election may be challenged as otherwise provided by law. After any person assumes an elective office, his qualifications to hold that office may be contested as otherwise provided by law.

**SOURCES:** Derived from 1972 Code § 23-3-63 [Codes, 1942, § 3191; Laws, 1935, ch. 19; repealed by Laws, 1986, ch. 495, § 333]; en, Laws, 1988, ch. 577, § 2; Laws, 1990, ch. 307, § 2; Laws, 2013, ch. 406, § 1, eff August 1, 2013 (the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Rights Act of 1965).

**Editor's Note —** The effective date of Chapter 406, Laws of 2013, which amended this section, is "from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended." However, after the bill was approved, the United States Supreme Court, in the case of *Shelby County v. Holder* (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Because of the *Shelby County* decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. The Supreme Court did not strike down Section 5, so it is still in effect. For that reason, the Mississippi Attorney General's Office submitted Chapter 406, Laws of 2013, to the United States Attorney General, in order to technically meet the requirements of Section 5 and fulfill the condition in the effective date of the bill, which will allow the bill to take effect.



By letter dated August 1, 2013, the United States Attorney General responded that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 406 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 406, so Chapter 406 became effective from and after August 1, 2013, the date of the United States Attorney General's response letter.



# TITLE 25

## PUBLIC OFFICERS AND EMPLOYEES; PUBLIC RECORDS

Chapter 1.	Public Officers; General Provisions .....	25-1-1
------------	---	--------

### CHAPTER 1

#### Public Officers; General Provisions

SEC.	
25-1-115.	Certain persons prohibited from serving on executive committees.

#### **§ 25-1-115. Certain persons prohibited from serving on executive committees.**

(1) No person shall serve on any temporary municipal executive committee, municipal executive committee, temporary county executive committee, county executive committee or state executive committee if the person has been convicted of a criminal violation of the Mississippi Election Code, has been convicted of an election crime contained in Chapter 13, Title 97, Mississippi Code of 1972, has been removed from public office pursuant to Section 25-5-1, or who has resigned from office as part of a plea agreement.

(2) Any person who violates this section shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided in Section 99-19-31 and removed from the committee.

**SOURCES: Laws, 2013, ch. 391, § 1, eff August 1, 2013 (the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Rights Act of 1965).**

**Editor's Note** — The effective date of Chapter 391, Laws of 2013, which added this section, is "from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended." However, after the bill was approved, the United States Supreme Court, in the case of *Shelby County v. Holder* (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Because of the *Shelby County* decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. The Supreme Court did not strike down Section 5, so it is still in effect. For that reason, the Mississippi Attorney General's Office submitted Chapter 391, Laws of 2013, to the United States Attorney General, in order to technically meet the requirements of Section 5 and fulfill the condition in the effective date of the bill, which will allow the bill to take effect.

By letter dated August 1, 2013, the United States Attorney General responded that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 391 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 391, so Chapter 391 became effective from and after August 1, 2013, the date of the United States Attorney General's response letter.



## CHAPTER 7

### Fees

#### § 25-7-27. Marshals and constables.

### JUDICIAL DECISIONS

#### 1. Payment of fee.

Since the constable had shown only an expectation of continuing to collect fees prior to the court receiving funds in case, defendants were not liable to pay the constable service of process fees up front

and the Constable failed to show deprivation of a right security by the constitution or a violation of 42 U.S.C.S. § 1983. *Bailey v. Jefferson County*, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 69050 (S.D. Miss. May 15, 2013).

## CHAPTER 43

### Administrative Procedures

#### ARTICLE 3.

#### RULE-MAKING ADOPTION AND EFFECTIVENESS OF RULES.

#### § 25-43-3.101. Advice on possible rules before notice of proposed rule adoption.

### JUDICIAL DECISIONS

#### 1. Promulgation of new rule not found.

Chancellor did not manifestly err by finding that the Mississippi State Tax Commission's requirement of an alternative apportionment method for a taxpayer's income did not amount to a rule, unduly promulgated in violation of the

Mississippi Administrative Procedures Act because the Commission utilized an existing alternative method as prescribed under an existing rule. *Equifax, Inc. v. Miss. Dep't of Revenue*, 125 So. 3d 36 (Miss. 2013), modified by 2013 Miss. LEXIS 604 (Miss. Nov. 21, 2013).

# TITLE 27

## TAXATION AND FINANCE

Chapter 65. Sales Tax ..... 27-65-1

### CHAPTER 13

#### Corporation Franchise Tax

#### § 27-13-25. Additional taxes or refunds.

#### JUDICIAL DECISIONS

##### 1. Penalties.

Chancery court did not commit manifest error by ruling that a taxpayer failed to prove it was entitled to reversal of the Mississippi State Tax Commission's imposition of penalties because it could reverse only if the taxpayer proved that the imposition of penalties was unsupported by substantial evidence presented to the

Commission, arbitrary and capricious, beyond the power of the Commission, or in violation of the taxpayer's statutory or constitutional rights, which the taxpayer failed to do. *Equifax, Inc. v. Miss. Dep't of Revenue*, 125 So. 3d 36 (Miss. 2013), modified by 2013 Miss. LEXIS 604 (Miss. Nov. 21, 2013).

### CHAPTER 25

#### Severance Taxes

#### ARTICLE 5.

#### OIL SEVERED OR PRODUCED IN STATE.

#### § 27-25-501. Definitions.

#### JUDICIAL DECISIONS

##### 2. Person.

Miss. Code Ann. §§ 27-25-501(h) and 27-25-701(i) show that a different meaning of "person" than that contained in Miss. Code Ann. § 1-3-39 was intended for the purposes of oil and gas severance taxation. *Jones County Sch. Dist. v. Miss. Dep't of Revenue*, 111 So. 3d 588 (Miss. 2013).

Oil and gas severance taxes levied under Miss. Code Ann. §§ 27-25-501 to 27-

25-525 and 27-25-701 to 27-25-723 did not apply to a school district because the school district did not meet the definition of "person" set forth in Miss. Code Ann. §§ 27-25-501(h) and 27-25-701(i), and there was nothing in the statutes indicating that the school district was subject to oil and gas severance taxes by necessary implication. *Jones County Sch. Dist. v. Miss. Dep't of Revenue*, 111 So. 3d 588 (Miss. 2013).

§ 27-25-509. Payment of tax; persons liable; lien.

JUDICIAL DECISIONS

**2. Royalty owner.**

Although oil companies, as the persons in charge of production operations, (1) deducted a school district's proportionate share of oil and gas severance taxes from any payment owed to the school district on its royalty interests derived from oil and gas production on sixteenth-section land and (2) remitted those taxes to the Department of Revenue on the school district's behalf, the oil and gas severance

taxes were levied upon the school district as a royalty owner because the taxes were levied in the first instance on the owners of the oil and gas in proportion to their interest and the Department of Revenue was to proceed against the school district, not the oil companies, to collect delinquent taxes. *Jones County Sch. Dist. v. Miss. Dep't of Revenue*, 111 So. 3d 588 (Miss. 2013).

ARTICLE 7.

NATURAL GAS SEVERED OR PRODUCED IN STATE.

§ 27-25-701. Definitions.

JUDICIAL DECISIONS

1. In general.
2. Person.

**1. In general.**

Oil and gas severance taxes levied under Miss. Code Ann. §§ 27-25-501 to 27-25-525 and 27-25-701 to 27-25-723 did not apply to a school district because the school district did not meet the definition of "person" set forth in Miss. Code Ann. §§ 27-25-501(h) and 27-25-701(i), and there was nothing in the statutes indicating that the school district was subject to oil and gas severance taxes by necessary

implication. *Jones County Sch. Dist. v. Miss. Dep't of Revenue*, 111 So. 3d 588 (Miss. 2013).

**2. Person.**

Miss. Code Ann. §§ 27-25-501(h) and 27-25-701(i) show that a different meaning of "person" than that contained in Miss. Code Ann. § 1-3-39 was intended for the purposes of oil and gas severance taxation. *Jones County Sch. Dist. v. Miss. Dep't of Revenue*, 111 So. 3d 588 (Miss. 2013).

§ 27-25-707. Payment of tax; persons liable; lien.

JUDICIAL DECISIONS

**2. Royalty owner.**

Although oil companies, as the persons in charge of production operations, (1) deducted a school district's proportionate share of oil and gas severance taxes from any payment owed to the school district on its royalty interests derived from oil and gas production on sixteenth-section land and (2) remitted those taxes to the De-

partment of Revenue on the school district's behalf, the oil and gas severance taxes were levied upon the school district as a royalty owner because the taxes were levied in the first instance on the owners of the oil and gas in proportion to their interest and the Department of Revenue was to proceed against the school district, not the oil companies, to collect delin-



quent taxes. Jones County Sch. Dist. v. Miss. Dep't of Revenue, 111 So. 3d 588 (Miss. 2013).

## CHAPTER 35

### Ad Valorem Taxes—Assessment

#### ARTICLE 1.

#### GENERAL PROVISIONS.

### § 27-35-50. Determination of true value for purposes of assessment.

#### JUDICIAL DECISIONS

##### 1. In general.

Legislature did not violate Miss. Const. art. 4, § 112 when it enacted subsection (4)(d) because § 112 explicitly allows the Legislature to adopt laws which dictate how true value is to be determined. Willow Bend Estates, LLC v. Humphreys County Bd. of Supervisors, — So. 3d —, 2013 Miss. LEXIS 550 (Miss. Oct. 17, 2013).

Trial court erred in finding that subsection (4)(d) did not preclude a county from including tax credits in the valuation privately owned housing complexes that were built in part using capital created by federal tax credits under the Low-Income Housing Tax Credit Program because the

properties, in terms of value, were not similarly situated to ordinary private complexes; the Legislature properly exercised its prerogative in limiting the valuation method for such properties. Willow Bend Estates, LLC v. Humphreys County Bd. of Supervisors, — So. 3d —, 2013 Miss. LEXIS 550 (Miss. Oct. 17, 2013).

Because the statute is not ambiguous, it is both unnecessary and improper for to attempt to divine the intent of the Legislature from three lines of deleted language. Willow Bend Estates, LLC v. Humphreys County Bd. of Supervisors, — So. 3d —, 2013 Miss. LEXIS 550 (Miss. Oct. 17, 2013).

## CHAPTER 65

### Sales Tax

Municipal Special Sales Tax ..... 27-65-241

#### MUNICIPAL SPECIAL SALES TAX

##### SEC.

27-65-241. Certain municipalities authorized to impose special sales tax on persons engaging in business in municipality; exemptions; voter approval required before levying tax; authorized use of tax proceeds; establishment of commission; expenditure of special tax revenue to be in accordance with master plan; establishment of master plan [For conditional repeal date of this section, see subsection (8)].

**§ 27-65-241. Certain municipalities authorized to impose special sales tax on persons engaging in business in municipality; exemptions; voter approval required before levying tax; authorized use of tax proceeds; establishment of commission; expenditure of special tax revenue to be in accordance with master plan; establishment of master plan [For conditional repeal date of this section, see subsection (8)].**

(1) As used in this section, the following terms shall have the meanings ascribed to them in this section unless otherwise clearly indicated by the context in which they are used:

(a) "Hotel" or "motel" means and includes a place of lodging that at any one time will accommodate transient guests on a daily or weekly basis and that is known to the trade as such. Such terms shall not include a place of lodging with ten (10) or less rental units.

(b) "Municipality" means any municipality in the State of Mississippi with a population of one hundred fifty thousand (150,000) or more according to the most recent federal decennial census.

(c) "Restaurant" means and includes all places where prepared food is sold and whose annual gross proceeds of sales or gross income for the preceding calendar year equals or exceeds One Hundred Thousand Dollars (\$100,000.00). The term "restaurant" shall not include any nonprofit organization that is exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code. For the purpose of calculating gross proceeds of sales or gross income, the sales or income of all establishments owned, operated or controlled by the same person, persons or corporation shall be aggregated.

(2)(a) Subject to the provisions of this section, the governing authorities of a municipality may impose upon all persons as a privilege for engaging or continuing in business or doing business within such municipality, a special sales tax at the rate of not more than one percent (1%) of the gross proceeds of sales or gross income of the business, as the case may be, derived from any of the activities taxed at the rate of seven percent (7%) or more under the Mississippi Sales Tax Law, Section 27-65-1 et seq.

(b) The tax levied under this section shall apply to every person making sales, delivery or installations of tangible personal property or services within the municipality but shall not apply to:

(i) Sales exempted by Sections 27-65-19, 27-65-101, 27-65-103, 27-65-105, 27-65-107, 27-65-109 and 27-65-111 of the Mississippi Sales Tax Law;

(ii) Gross proceeds of sales or gross income of restaurants derived from the sale of food and beverages;

(iii) Gross proceeds of sales or gross income of hotels and motels derived from the sale of hotel rooms and motel rooms for lodging purposes;

(iv) Retail sales of food for human consumption not purchased with food stamps issued by the United States Department of Agriculture, or other federal agency, but which would be exempt under Section 27-65-

111(o) from the taxes imposed by this chapter if the food items were purchased with food stamps; and

(v) Gross income of businesses engaging or continuing in the business of TV cable systems, subscription TV services, and other similar activities, including, but not limited to, cable Internet services.

(3)(a) Before any tax authorized under this section may be imposed, the governing authorities of the municipality shall adopt a resolution declaring its intention to levy the tax, setting forth the amount of the tax to be imposed, the purposes for which the revenue collected pursuant to the tax levy may be used and expended, the date upon which the tax shall become effective, the date upon which the tax shall be repealed, and calling for an election to be held on the question. The date of the election shall be set in the resolution. Notice of the election shall be published once each week for at least three (3) consecutive weeks in a newspaper published or having a general circulation in the municipality, with the first publication of the notice to be made not less than twenty-one (21) days before the date fixed in the resolution for the election and the last publication to be made not more than seven (7) days before the election. At the election, all qualified electors of the municipality may vote. The ballots used at the election shall have printed thereon a brief description of the sales tax, the amount of the sales tax levy, a description of the purposes for which the tax revenue may be used and expended and the words "FOR THE LOCAL SALES TAX" and "AGAINST THE LOCAL SALES TAX" and the voter shall vote by placing a cross (X) or check mark (✓) opposite his choice on the proposition. When the results of the election have been canvassed by the election commissioners of the municipality and certified by them to the governing authorities, it shall be the duty of such governing authorities to determine and adjudicate whether at least three-fifths ( $\frac{3}{5}$ ) of the qualified electors who voted in the election voted in favor of the tax. If at least three-fifths ( $\frac{3}{5}$ ) of the qualified electors who voted in the election voted in favor of the tax, the governing authorities shall adopt a resolution declaring the levy and collection of the tax provided in this section and shall set the first day of the second month following the date of such adoption as the effective date of the tax levy. A certified copy of this resolution, together with the result of the election, shall be furnished to the Department of Revenue not less than thirty (30) days before the effective date of the levy.

(b) A municipality shall not hold more than two (2) elections under this subsection.

(4) The revenue collected pursuant to the tax levy imposed under this section may be expended to pay the cost of road and street repair, reconstruction and resurfacing projects based on traffic patterns, need and usage, and to pay the costs of water, sewer and drainage projects in accordance with a master plan adopted by the commission established pursuant to subsection (7).

(5)(a) The special sales tax authorized by this section shall be collected by the Department of Revenue, shall be accounted for separately from the amount of sales tax collected for the state in the municipality and shall be



paid to the municipality. The Department of Revenue may retain one percent (1%) of the proceeds of such tax for the purpose of defraying the costs incurred by the department in the collection of the tax. Payments to the municipality shall be made by the Department of Revenue on or before the fifteenth day of the month following the month in which the tax was collected.

(b) The proceeds of the special sales tax shall be placed into a special municipal fund apart from the municipal general fund and any other funds of the municipality, and shall be expended by the municipality solely for the purposes authorized in subsection (4) of this section. The records reflecting the receipts and expenditures of the revenue from the special sales tax shall be audited annually by an independent certified public accountant. The accountant shall make a report of his findings to the governing authorities of the municipality and file a copy of his report with the Secretary of the Senate and the Clerk of the House of Representatives. The audit shall be made and completed as soon as practical after the close of the fiscal year of the municipality, and expenses of the audit shall be paid from the funds derived by the municipality pursuant to this section.

(c) All provisions of the Mississippi Sales Tax Law applicable to filing of returns, discounts to the taxpayer, remittances to the Department of Revenue, enforced collection, rights of taxpayers, recovery of improper taxes, refunds of overpaid taxes or other provisions of law providing for imposition and collection of the state sales tax shall apply to the special sales tax authorized by this section, except where there is a conflict, in which case the provisions of this section shall control. Any damages, penalties or interest collected for the nonpayment of taxes imposed under this section, or for noncompliance with the provisions of this section, shall be paid to the municipality on the same basis and in the same manner as the tax proceeds. Any overpayment of tax for any reason that has been disbursed to a municipality or any payment of the tax to a municipality in error may be adjusted by the Department of Revenue on any subsequent payment to the municipality pursuant to the provisions of the Mississippi Sales Tax Law. The Department of Revenue may, from time to time, make such rules and regulations not inconsistent with this section as may be deemed necessary to carry out the provisions of this section, and such rules and regulations shall have the full force and effect of law.

(6) If a municipality expands its corporate boundaries, the governing authorities of the municipality may not impose the special sales tax in the annexed area unless the tax is approved at an election conducted, as far as is practicable, in the manner provided in subsection (3) of this section, except that only qualified electors in the annexed area may vote in the election.

(7)(a) Any municipality that levies the special sales tax authorized under this section shall establish a commission as provided for in this section. Expenditures of revenue from the special sales tax authorized by this section shall be in accordance with a master plan adopted by the commission pursuant to this subsection.

(b) The commission shall be composed of ten (10) voting members who shall be known as commissioners appointed as follows:

(i) Four (4) members representing the business community in the municipality appointed by the local chamber of commerce for initial terms of one (1), two (2), four (4) and five (5) years respectively. The members appointed pursuant to this paragraph shall be persons who represent businesses located within the city limits of the municipality.

(ii) Three (3) members shall be appointed at large by the mayor of the municipality, with the advice and consent of the legislative body of the municipality, for initial terms of two (2), three (3) and four (4) years respectively. All appointments made by the mayor pursuant to this paragraph shall be residents of the municipality.

(iii) One (1) member shall be appointed at large by the Governor for an initial term of four (4) years. All appointments made by the Governor pursuant to this paragraph shall be residents of the municipality.

(iv) One (1) member shall be appointed at large by the Lieutenant Governor for an initial term of four (4) years. All appointments made by the Lieutenant Governor pursuant to this paragraph shall be residents of the municipality.

(v) One (1) member shall be appointed at large by the Speaker of the House of Representatives for a term of four (4) years. All appointments made by the Speaker of the House of Representatives pursuant to this paragraph shall be residents of the municipality.

(c) The terms of all appointments made subsequent to the initial appointment shall be made for five (5) years. Any vacancy which may occur shall be filled in the same manner as the original appointment and shall be made for the unexpired term. Each member of the commission shall serve until his successor is appointed and qualified.

(d) The mayor of the municipality shall designate a chairman of the commission from among the membership of the commission. The vice chairman and secretary shall be elected by the commission from among the membership of the commission for a term of two (2) years. The vice chairman and secretary may be reelected, and the chairman may be reappointed.

(e) The commissioners shall serve without compensation.

(f) Any commissioner shall be disqualified and shall be removed from office for either of the following reasons:

(i) Conviction of a felony in any state court or in federal court; or

(ii) Failure to attend three (3) consecutive meetings without just cause.

If a commissioner is removed for any of the above reasons, the vacancy shall be filled in the manner prescribed in this section and shall be made for the unexpired term.

(g) A quorum shall consist of six (6) voting members of the commission. The commission shall adopt such rules and regulations as may govern the time and place for holding meetings, regular and special.

(h) The commission shall, with input from the municipality, establish a master plan for road and street repair, reconstruction and resurfacing



projects based on traffic patterns, need and usage, and for water, sewer and drainage projects. Expenditures of the revenue from the tax authorized to be imposed pursuant to this section shall be made at the discretion of the governing authorities of the municipality if the expenditures comply with the master plan. The commission shall monitor the compliance of the municipality with the master plan.

(8) This section shall stand repealed from and after July 1, 2032; however, if the tax fails to be adopted at an election held for such purpose prior to July 1, 2014, this section shall stand repealed from and after July 1, 2014.

**SOURCES:** Laws, 2009, ch. 328, § 1; Laws, 2011, ch. 483, § 1, eff May 29, 2012 (the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the amendment of this section.)

**Editor's Note** — Chapter 483, Laws of 2011, was submitted to the United States Attorney General for preclearance under Section 5 of the Voting Rights Act. The United States Attorney General responded in a letter dated May 29, 2012, and interposed no objection to the substantive provisions of Chapter 483. The letter also said that certain other changes made by Chapter 483 were not yet capable of administration and therefore were not ripe for review by the United States Attorney General, but the State must seek review of those provisions under Section 5 after they have been implemented. The United States Supreme Court, in the case of *Shelby County v. Holder* (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5. Because of the *Shelby County* decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. Accordingly, those other provisions of Chapter 483 do not have to be submitted for preclearance, and all of Chapter 483 is now in effect.

## CHAPTER 77

### Appellate Review for Taxpayers Aggrieved by Certain Actions of the Department of Revenue

**§ 27-77-7. Judicial review of Board of Tax Appeals' findings and order; petition; surety bond; payment under protest in lieu of bond; payment of uncontested tax by taxpayer; payment of uncontested overpayment by agency; issuance of summons; trial; appeals of chancery court order to Supreme Court.**

#### JUDICIAL DECISIONS

##### 1. Burden of proof.

Chancery court properly limited its analysis to determining whether a taxpayer had proven that it was entitled to reversal of the Mississippi State Tax Com-

mission's decision for any of the prescribed legal bases for reversing an agency decision; under the statute, the chancery court must hold a judicial hearing to determine whether the taxpayer



challenging the Commission decision can prove entitlement to any or all of the relief requested by a preponderance of the evidence. *Equifax, Inc. v. Miss. Dep't of Revenue*, 125 So. 3d 36 (Miss. 2013), modified by 2013 Miss. LEXIS 604 (Miss. Nov. 21, 2013).

Instruction to “try the case de novo” is misdirected because the statute provides a judicial forum to try anew (or for the first time) the legal issues raised by the taxpayer in chancery court. Its limited purpose is only to examine whether the Mississippi State Tax Commission’s decision was supported by substantial evidence, was not arbitrary and capricious, was within the Commission’s power to make, and did not violate the taxpayer’s statutory or constitutional rights. *Equifax, Inc. v. Miss. Dep't of Revenue*, 125 So. 3d 36 (Miss. 2013), modified by 2013 Miss. LEXIS 604 (Miss. Nov. 21, 2013).

Court of appeals erred by reversing a judgment on standard-of-review and burden-of-proof grounds because it improperly construed the statute as imposing a

de-novo standard of review; in a taxpayer’s suit in chancery court appealing a final judgment of the Mississippi State Tax Commission, as in all other judicial proceedings, the party petitioning the court for relief bears the burden of proving its claims by a preponderance of the evidence or a higher standard, if required by the issues raised. *Equifax, Inc. v. Miss. Dep't of Revenue*, 125 So. 3d 36 (Miss. 2013), modified by 2013 Miss. LEXIS 604 (Miss. Nov. 21, 2013).

Court of appeals erred by reversing a judgment requiring a taxpayer to prove that the Mississippi State Tax Commission’s decision was unsupported by substantial evidence, arbitrary and capricious, beyond its power, or in violation of a statutory or constitutional right of the taxpayer because the chancery court applied the proper standard of review and burden of proof; the statute places the burden on the taxpayer challenging a Commission decision to prove its entitlement to relief. *Equifax, Inc. v. Miss. Dep't of Revenue*, 125 So. 3d 36 (Miss. 2013), modified by 2013 Miss. LEXIS 604 (Miss. Nov. 21, 2013).



# TITLE 31

## PUBLIC BUSINESS, BONDS AND OBLIGATIONS

### CHAPTER 3

#### State Board of Public Contractors

##### § 31-3-1. Definitions.

#### JUDICIAL DECISIONS

##### 1. In general.

As the pipe cleaning a subcontractor performed was a necessary part of the reconstruction, repair, maintenance, or related work on a public project, it was required to have a certificate of responsibility; as it did not, its subcontract with a general contractor was void and could not

support claims of breach of contract or quantum meruit. *Ace Pipe Cleaning, Inc. v. Hemphill Constr. Co.*, — So. 3d —, 2013 Miss. App. LEXIS 276 (Miss. Ct. App. May 21, 2013), opinion withdrawn by, substituted opinion at 2014 Miss. App. LEXIS 39 (Miss. Ct. App. Jan. 7, 2014).

##### § 31-3-15. Certificates of responsibility required for bid.

#### JUDICIAL DECISIONS

##### 1. In general.

Although appellant's construction contract with appellee was void due to appellant's failure to obtain a certificate of responsibility, as appellee knew appellant lacked the certificate but solicited it to enter into the illegal contract, appellant was not barred from recovery under theories of unjust enrichment or quantum meruit. *Ground Control, LLC v. Capsco Indus.*, 120 So. 3d 365 (Miss. 2013).

As the pipe cleaning a subcontractor performed was a necessary part of the reconstruction, repair, maintenance, or related work on a public project, it was required to have a certificate of responsibility; as it did not, its subcontract with a general contractor was void and could not support claims of breach of contract or quantum meruit. *Ace Pipe Cleaning, Inc.*

*v. Hemphill Constr. Co.*, — So. 3d —, 2013 Miss. App. LEXIS 276 (Miss. Ct. App. May 21, 2013), opinion withdrawn by, substituted opinion at 2014 Miss. App. LEXIS 39 (Miss. Ct. App. Jan. 7, 2014).

As a subcontract was void due to the subcontractor's lack of a certificate of responsibility, the general contractor did not have the right to accept or reject the transaction; therefore, the doctrine of quasi-estoppel did not apply and the subcontractor's breach of contract and quantum meruit claims against the general contractor were properly dismissed. *Ace Pipe Cleaning, Inc. v. Hemphill Constr. Co.*, — So. 3d —, 2013 Miss. App. LEXIS 276 (Miss. Ct. App. May 21, 2013), opinion withdrawn by, substituted opinion at 2014 Miss. App. LEXIS 39 (Miss. Ct. App. Jan. 7, 2014).



§ 31-3-21. Bidding and awards.

JUDICIAL DECISIONS

1. In general.
2. Illustrative cases.

**1. In general.**

As the pipe cleaning a subcontractor performed was a necessary part of the reconstruction, repair, maintenance, or related work on a public project, it was required to have a certificate of responsibility; as it did not, its subcontract with a general contractor was void and could not support breach of contract or quantum meruit claims. *Ace Pipe Cleaning, Inc. v. Hemphill Constr. Co.*, — So. 3d —, 2013 Miss. App. LEXIS 276 (Miss. Ct. App. May 21, 2013), opinion withdrawn by, substituted opinion at 2014 Miss. App. LEXIS 39 (Miss. Ct. App. Jan. 7, 2014).

As a subcontract was void due to the subcontractor's lack of a certificate of responsibility, the general contractor did not have the right to accept or reject the transaction; therefore, the doctrine of quasi-estoppel did not apply and the sub-

contractor's breach of contract and quantum meruit claims against the general contractor were properly dismissed. *Ace Pipe Cleaning, Inc. v. Hemphill Constr. Co.*, — So. 3d —, 2013 Miss. App. LEXIS 276 (Miss. Ct. App. May 21, 2013), opinion withdrawn by, substituted opinion at 2014 Miss. App. LEXIS 39 (Miss. Ct. App. Jan. 7, 2014).

**2. Illustrative cases.**

Though appellant's competitor, a Mississippi company, had not been entitled to a statutory preference since Alabama treated nonresident contractors in the same manner that Mississippi treated nonresident contractors, because the competitor's residence played only a minor part in the school board's decision to award the contract to the competitor, the award was not disturbed on appeal. *Rod Cooke Constr. Co. v. Lamar County Sch. Bd.*, — So. 3d —, 2013 Miss. App. LEXIS 641 (Miss. Ct. App. Oct. 1, 2013).

CHAPTER 5

Public Works Contracts

BONDS SECURING PUBLIC CONSTRUCTION CONTRACTS

§ 31-5-53. Time for bringing suit on bond; venue.

JUDICIAL DECISIONS

**2. Accrual of action.**

Where plaintiff alleged that its action on a surety bond was timely because it met the statute of limitations by one day, based on work performed on February 18, 2011, the action was time barred because there was nothing in the evidence which adequately suggested that the work done on the 18th was significant and crucial to

the construction project as a whole or that the work done on that date was anything more than remedial and/or corrective. *Triangle Maint. Serv., LLC v. Liberty Mut. Ins. Co.* (In re Triangle Maint. Case No. 11-15142 Serv., LLC), — Bankr. —, 2013 Bankr. LEXIS 927 (Bankr. N.D. Miss. Mar. 12, 2013).

## CHAPTER 7

## Public Purchases

## IN GENERAL

## § 31-7-13. Bid requirements and exceptions; public auctions.

## JUDICIAL DECISIONS

**2. Factors considered.**

That appellant's suppliers were protected by a payment bond given under Miss. Code Ann. § 85-7-185 did not preclude a school board, which awarded the contract to the next lowest bidder, from considering appellant's prior payment disputes with suppliers. *Rod Cooke Constr. Co. v. Lamar County Sch. Bd.*, — So. 3d —, 2013 Miss. App. LEXIS 641 (Miss. Ct. App. Oct. 1, 2013).

School board's award of contract to appellant's competitor, though appellant

was the lowest bidder, was not arbitrary or capricious, because the board was not statutorily obligated to accept the lowest bid, and the bid documents stated that the board could award a contract to an entity other than the lowest bidder if it determined it was "best" to do so. *Rod Cooke Constr. Co. v. Lamar County Sch. Bd.*, — So. 3d —, 2013 Miss. App. LEXIS 641 (Miss. Ct. App. Oct. 1, 2013).

## § 31-7-47. Preference to resident contractors.

## JUDICIAL DECISIONS

**2. Illustrative cases.**

Though appellant's competitor, a Mississippi company, had not been entitled to a statutory preference since Alabama treated nonresident contractors in the same manner that Mississippi treated nonresident contractors, because the com-

petitor's residence played only a minor part in the school board's decision to award the contract to the competitor, the award was not disturbed on appeal. *Rod Cooke Constr. Co. v. Lamar County Sch. Bd.*, — So. 3d —, 2013 Miss. App. LEXIS 641 (Miss. Ct. App. Oct. 1, 2013).





## TITLE 37

### EDUCATION

Chapter 5.	County Boards of Education and Superintendents .....	37-5-1
Chapter 7.	School Districts; Boards of Trustees of School Districts .....	37-7-1
Chapter 17.	Accreditation of Schools .....	37-17-1

#### CHAPTER 5

#### County Boards of Education and Superintendents

County Boards of Education .....	37-5-1
----------------------------------	--------

#### COUNTY BOARDS OF EDUCATION

SEC.  
37-5-19.        Filling of vacancies on board.

#### § 37-5-19.    Filling of vacancies on board.

Vacancies in the membership of the county board of education shall be filled by appointment, within sixty (60) days after the vacancy occurs, by the remaining members of the county board of education. Said appointee shall be selected from the qualified electors of the district in which the vacancy occurs, and shall serve until the first Monday of January next succeeding the next general election, at which general election a member shall be elected to fill the remainder of the unexpired term in the same manner and with the same qualifications applicable to the election of a member for the full term. In the event the school district is under conservatorship and no members of the county board of education remain in office, the Governor shall call a special election to fill the vacancies and said election will be conducted by the county election commission.

In the event the vacancy occurs more than five (5) months prior to the next general election and the remaining members of the county board of education are unable to agree upon an individual to be appointed, any two (2) of the remaining members may certify such disagreement to the county election commission. Upon the receipt of such a certificate by the county election commission, or any member thereof, the commission shall hold a special election to fill the vacancy, which said election, notice thereof and ballot shall be controlled by the laws concerning special elections to fill vacancies in county or county district offices. The person elected at such a special election shall serve for the remainder of the unexpired term.

**SOURCES:** Codes, 1942, § 6271-04; Laws, 1953, Ex Sess ch. 10, § 4; Laws, 1960, ch. 299; Laws, 2013, ch. 331, § 2; Laws, 2013, ch. 363, § 2, eff July 16, 2013 (the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Rights Act of 1965)

**Editor’s Note** — This section was amended by two bills in 2013. The effective date of each of the two bills that amended this section, Chapter 331 (House Bill No. 975) and Chapter 363 (Senate Bill No. 2779), is “from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended.” However, after the bills were approved, the United States Supreme Court, in the case of *Shelby County v. Holder* (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Because of the *Shelby County* decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. The Supreme Court did not strike down Section 5, so it is still in effect. Chapter 331 was submitted to the United States Attorney General before the *Shelby County* decision was rendered. In a letter dated July 9, 2013, the United States Attorney General responded that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 331 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 331, so Chapter 331 became effective on the date of the response letter from the United States Attorney General, July 9, 2013.

Chapter 363 was not submitted before the *Shelby County* decision, but the Mississippi Attorney General’s Office submitted Chapter 363 to the United States Attorney General, in order to technically meet the requirements of Section 5 and fulfill the condition in the effective date of the bill, which will allow the bill to take effect.

By letter dated July 16, 2013, the United States Attorney General responded that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 363 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 363, so Chapter 363 became effective from and after July 16, 2013, the date of the United States Attorney General’s response letter. Because that date is later than the date of the response letter for Chapter 331, the version of this section in Chapter 363 is the controlling version of this section.

CHAPTER 7

School Districts; Boards of Trustees of School Districts

Article 3.	Abolition, Alteration and Creation of Districts .....	37-7-101
Article 5.	Boards of Trustees; Qualifications, Selection and Meetings .....	37-7-201

ARTICLE 3.

ABOLITION, ALTERATION AND CREATION OF DISTRICTS.

SEC.		
37-7-103.	Abolition, reorganization or alteration of district by school board.	
37-7-104.2.	Administrative consolidation of all school districts in Clay County, Mississippi, into one school district; procedure.	
37-7-104.3.	Administrative consolidation of all school districts in Oktibbeha County, Mississippi, into one municipal separate school district; procedure.	



### § 37-7-103. Abolition, reorganization or alteration of district by school board.

From and after July 1, 1987, the school board of any school district shall have full jurisdiction, power and authority, at any regular meeting thereof or at any special meeting called for that purpose, to abolish such existing district, or to reorganize, change or alter the boundaries of any such district. In addition thereto, with the consent of the school board of the school district involved, the school board may add to such school district any part of the school district adjoining same, and with the consent of the school board of the school district involved, may detach territory from such school district and annex same to an adjoining district. Provided, however, that the consent of the school board of the school districts involved in implementing the provisions of Section 37-7-104 or Section 37-7-104.2 or Section 37-7-104.3 shall not be required for the administrative consolidation of such school districts pursuant to the order of the State Board of Education.

**SOURCES:** Codes, 1942, § 6274-06; Laws, 1953, Ex Sess, ch. 16, § 6; Laws, 1986, ch. 492, § 52; Laws, 2012, ch. 441, § 2; Laws, 2012, ch. 551, § 1; Laws, 2013, ch. 568, § 2; Laws, 2013, ch. 572, § 3, eff October 25, 2013 (the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Rights Act of 1965).)

**Joint Legislative Committee Note** — Section 2 of ch. 568, Laws of 2013, effective October 25, 2013, the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Rights Act of 1965 (approved on April 25, 2013), amended this section. Section 3 of ch. 572, Laws of 2013, effective October 24, 2013, the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Rights Act of 1965 (approved on April 25, 2013), also amended this section. As set out above, this section reflects the language of both amendments, pursuant to Section 1-1-109 which gives the Joint Legislative Committee on Compilation, Revision and Publication of Legislation authority to integrate amendments so that all versions of the same code section enacted within the same legislative session may become effective. The Joint Committee on Compilation, Revision and Publication of Legislation ratified the integration of these amendments as consistent with the legislative intent at the August 1, 2013, meeting of the Committee.

**Editor's Note** — This section was amended by two bills in 2013. The effective date of each of the two bills that amended this section, Chapter 572 (House Bill No. 716) and Chapter 568 (Senate Bill No. 2637), is "from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended." However, after the bills were approved, the United States Supreme Court, in the case of *Shelby County v. Holder* (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Because of the *Shelby County* decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. The Supreme Court did not strike down Section 5, so it is still in effect. For that reason, the Mississippi Attorney General's Office submitted Chapter 572 and Chapter 568 to the United States Attorney General, in order to technically meet the requirements of Section 5 and fulfill the condition in the effective date of the bills, which will allow the bills to take effect.



By letter dated October 24, 2013, the United States Attorney General responded to the submission of Chapter 572, that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 572 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 572, so Chapter 572 became effective from and after October 24, 2013, the date of the United States Attorney General's response letter.

By letter dated October 25, 2013, the United States Attorney General responded to the submission of Chapter 568, that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 568 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 568, so Chapter 568 became effective from and after October 25, 2013, the date of the United States Attorney General's response letter.

The Joint Committee on Compilation, Revision and Publication of Legislation, in its meeting on August 1, 2013, voted to integrate the amendments to this section by Chapter 572 and Chapter 568. The amendments to this section became effective from and after October 25, 2013, the date of the latest response letter from the United States Attorney General.

**§ 37-7-104.2. Administrative consolidation of all school districts in Clay County, Mississippi, into one school district; procedure.**

(1) In Clay County, Mississippi, in which are located, as of January 1, 2013, two (2) school districts, there shall be an administrative consolidation of all of those school districts in the county into one (1) new consolidated school district to be designated as West Point Consolidated School District which shall consist of the territory of the former Clay County School District and the West Point School District. The central administrative office of the West Point Consolidated School District shall be located in West Point, Mississippi.

(2) On or before September 1, 2013, the State Board of Education shall serve the local school boards in Clay County with notice and instructions regarding the timetable for action to be taken to comply with the administrative consolidation required in this section. The State Board of Education shall provide for the administrative consolidation of the school districts in the county on or before July 1, 2015. In the new West Point Consolidated School District, there shall be a new board of trustees comprised of five (5) members selected as follows: (a) the Mayor and Board of Aldermen of the City of West Point shall appoint three (3) of the five (5) members, each to be selected for a term of four (4) years; and (b) two (2) members to be elected for a term of four (4) years by the electors of Clay County residing outside of the West Point corporate limits who shall be residents of that territory and who shall be elected in a November 2014 special election which shall be called by the Governor for that purpose. All subsequent members of the board elected from the territory outside of the West Point corporate limits shall be elected for a term of four (4) years at the regular general election held on the first Monday in November next preceding the expiration of the term of office of the respective member or members. All elected and appointed members shall take office on the first Monday of January following the date of their election or

appointment. The State Board of Education, with the assistance of the Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER), shall apportion the territory of the new consolidated school district located outside the West Point corporate limits into two (2) new single member board of trustee election districts. The State Board of Education shall thereafter publish the same in some newspaper of general circulation in the county for at least three (3) consecutive weeks and after having given notice of publication and recording the same upon the minutes of the school boards of each school district in the county, the new district lines will thereafter be effective for the November 2014 special election. Any school board member of the former school districts residing in the proper territory shall be eligible for appointment or election to the new Board of Trustees for West Point Consolidated School District.

Any school district affected by the required administrative consolidation in Clay County that does not voluntarily consolidate as ordered by the State Board of Education shall be administratively consolidated by the State Board of Education, to be effective on July 1 following the election of the new local school board. The State Board of Education shall promptly move on its own motion to administratively consolidate a school district which does not voluntarily consolidate in order to enable the affected school districts to reasonably accomplish the resulting administrative consolidation into one (1) consolidated school district by July 1 following the selection of the new board of trustees. The affected school districts shall comply with any consolidation order issued by the State Board of Education on or before July 1 following the selection of the new school boards.

(3) On July 1 following the selection of the new Board of Trustees of the West Point Consolidated School District, the former county board of education and the former Board of Trustees of the West Point School District shall be abolished. All real and personal property which is owned or titled in the name of a school district located in such former school district shall be transferred to the new reorganized school district of West Point Consolidated School District in which such former school district is located. Each former school board shall be responsible for establishing the contracts for teachers and principals for the next school year following the required administrative consolidation with the consultation of the newly elected successor school board. The new Board of Trustees for the West Point Consolidated School District shall appoint the Superintendent of Schools for the school district. The Superintendent of Schools for the West Point Consolidated School District may appoint assistant superintendent(s) of schools for the district, but in no instance shall the administrative leadership of the West Point Consolidated School District exceed the number of assistant superintendents employed in the former West Point School District. The subsequent superintendent of schools of the reorganized school district shall not be elected, but shall thereafter be appointed by the successor board of trustees in the manner provided in Section 37-9-25. It shall be the responsibility of the successor board of trustees to prepare and approve the budget of the new reorganized district, and the successor board of



trustees may use staff from the former school districts to prepare the budget. Any proposed order of the State Board of Education directing the transfer of the assets, real or personal property of an affected school district in the county, shall be final and conclusive for the purposes of the transfer of property required by such administrative consolidation. Any person or school district aggrieved by an order of the successor newly selected Board of Trustees of the West Point Consolidated School District pursuant to the required administrative consolidation may appeal therefrom within ten (10) days from the date of the adjournment of the meeting at which such order is entered. Said appeal shall be taken in the same manner as appeals are taken from judgments or decisions of the board of supervisors as provided in Section 11-51-75, Mississippi Code of 1972, the provisions of which shall be fully applicable to appeals taken hereunder. The Board of Trustees of the West Point Consolidated School District shall not pass upon or approve or disapprove any such order until the time for an appeal therefrom shall have expired, nor shall said board pass upon or approve or disapprove any such order from which an appeal is taken until said appeal shall have been finally determined.

(4) When any school district in the county is abolished under the provisions of this section, the abolition thereof shall not impair or release the property of that former school district from liability for the payment of the bonds or other indebtedness of such district.

(5) Nothing in this section shall be construed to require the closing of any school or school facility, unless the facility is an unneeded administrative office located within a school district which has been abolished under the provisions of this section. All administrative consolidations under this section shall be accomplished so as not to delay or in any manner negatively affect the desegregation of another school district in the county pursuant to court order.

(6) The State Board of Education shall promulgate rules and regulations to facilitate the administrative consolidation of the school districts in Clay County pursuant to this section. The consolidated districts shall make an election within one (1) year of consolidation concerning the group term life insurance described in subsection (7) of Section 25-15-9. When the orders of the State Board of Education adopting the boundaries of the successor board of trustees election districts have been entered and are final, as directed by the State Board of Education, the new district lines shall be submitted by the State Board of Education with the assistance of the Attorney General to the Attorney General of the United States for preclearance or to the United States District Court for the District of Columbia for a declaratory judgment in accordance with the provisions of the Voting Rights Act of 1965, as amended and extended. In the event the change in the school district lines and election districts are precleared or approved, the State Board of Education shall formally declare the new lines as the new boundaries of the successor school district.

(7) For the initial two (2) years following the administrative consolidation required by this section, the State Department of Education may grant a waiver of accountability and state assessment requirements to the West Point Consolidated School District for the student population enrolled therein from



the former Clay County School District when determining the new consolidated school district accreditation level on the performance and accountability rating model.

**SOURCES:** Laws, 2013, ch. 568, § 1, eff October 25, 2013 (the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Rights Act of 1965)

**Editor's Note** — The effective date of Chapter 568, which added this section, is "from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended." However, after the bill was approved, the United States Supreme Court, in the case of *Shelby County v. Holder* (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Because of the *Shelby County* decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. The Supreme Court did not strike down Section 5, so it is still in effect. For that reason, the Mississippi Attorney General's Office submitted Chapter 568 to the United States Attorney General, in order to technically meet the requirements of Section 5 and fulfill the condition in the effective date of the bill, which will allow the bill to take effect.

By letter dated October 25, 2013, the United States Attorney General responded to the submission of Chapter 568 that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 568 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 568, so Chapter 568 became effective from and after October 25, 2013, the date of the United States Attorney General's response letter.

### **§ 37-7-104.3. Administrative consolidation of all school districts in Oktibbeha County, Mississippi, into one municipal separate school district; procedure.**

(1) In Oktibbeha County, Mississippi, in which are located, as of January 1, 2013, two (2) school districts, there shall be an administrative consolidation of all of those school districts in the county into one (1) new countywide municipal separate school district to be designated as Starkville Consolidated School District which shall consist of the territory of the former Oktibbeha County School District and the Starkville School District, effective on July 1, 2015. Until June 30, 2015, preceding the effective date of the required administrative consolidation of school districts in the county, the Oktibbeha County School District shall remain in conservatorship, under the authority and control of the Mississippi Recovery School District of the State Department of Education. At such time that the administrative consolidation becomes effective, the central administrative office of the Starkville Consolidated School District shall be located in Starkville, Mississippi.

(2) On or before July 1, 2014, the State Board of Education shall serve the local school board of the Starkville School District with notice and instructions regarding the timetable for action to be taken to comply with the administrative consolidation required in this section. In the new consolidated school

district there shall be a countywide municipal separate school district board of trustees, which shall consist of the existing members of the Board of Trustees of the Starkville School District serving as a member on July 1, 2015. However, upon the first occurrence of a vacancy on the board as a result of an expired term of an appointed board member, that vacancy shall become an elected position and shall be filled by the election of a board member by the county board of supervisors in the manner prescribed in Section 37-7-203(1) for the election of a member who resides outside of the incorporated municipal limits. The Board of Supervisors of Oktibbeha County shall thereafter publish the same in some newspaper of general circulation in the county for at least three (3) consecutive weeks and after having given notice of publication and recording the same upon the minutes of the school boards of each school district in the county. Any school district affected by the required administrative consolidation in the county that does not voluntarily consolidate as ordered by the State Board of Education shall be administratively consolidated by the State Board of Education, to be effective immediately upon action of the State Board of Education. The State Board of Education shall promptly move on its own motion to administratively consolidate a school district which does not voluntarily consolidate in order to enable the affected school districts to reasonably accomplish the resulting administrative consolidation into one (1) consolidated school district by July 1 following the motion to consolidate. The affected school districts shall comply with any consolidation order issued by the State Board of Education.

(3) On July 1, 2015, following the motion of State Board of Education to consolidate school districts in Oktibbeha County, the Oktibbeha County School District shall be abolished. All real and personal property which is owned or titled in the name of the school district located in such former school district shall be transferred to the Starkville Consolidated School District. The Board of Trustees of the Starkville Consolidated School District shall be responsible for establishing the contracts for teachers, principals, clerical and administrative staff personnel for the 2015-2016 school year and thereafter and shall consult with the conservator for the establishment of contracts for teachers, principals, clerical and administrative staff personnel located in the former Oktibbeha County School District for the 2015-2016 school year. The superintendent and assistant superintendent(s) of schools of the former Starkville School District shall continue to serve in like administrative capacities of the Starkville Consolidated School District, but in no instance shall the administrative leadership of the Starkville Consolidated School District exceed three (3) assistant superintendents to be appointed by the superintendent of the former Starkville School District. No superintendent serving in the former school district located in the county designated as an under-performing school district or placed under conservatorship shall be eligible for appointment as a superintendent or assistant superintendent in the Starkville Consolidated School District. Likewise, no trustee serving in the former school district located in the county designated as an under-performing school district or placed under conservatorship shall be eligible for election to the new Board of



Trustees of the Starkville Consolidated School District. It shall be the responsibility of the board of trustees to prepare and approve the budget of the respective new reorganized district, and the board of trustees may use staff from the former school district to prepare the budget. Any proposed order of the State Board of Education directing the transfer of the assets, real or personal property of an affected school district in the county, shall be final and conclusive for the purposes of the transfer of property required by such administrative consolidation.

(4) Nothing in this section shall be construed to require the closing of any school or school facility, unless the facility is an unneeded administrative office located within a school district which has been abolished under the provisions of this section. All administrative consolidations under this section shall be accomplished so as not to delay or in any manner negatively affect the desegregation of another school district in the county pursuant to court order.

(5) The State Board of Education shall promulgate rules and regulations to facilitate the administrative consolidation of the school districts in Oktibbeha County pursuant to this section. The consolidated districts shall make an election within one (1) year of consolidation concerning the group term life insurance described in Section 25-15-9(7).

(6) For the initial three (3) years following the administrative consolidation required by this section, the State Department of Education shall grant a waiver of accountability and state assessment requirements to the Starkville Consolidated School District for the student population enrolled therein from the former Oktibbeha County School District when determining the new consolidated school district accreditation level on the performance and accountability rating model.

(7) The governing school board and superintendent of schools of the Starkville Public School District shall collaborate with the State Department of Education and the appointed conservator of the Oktibbeha County School District, as soon as practicable after the effective date of this act, for the planning and transition of programs, services and alignment of curriculum for the administratively consolidated school districts.

**SOURCES:** Laws, 2013, ch. 572, § 2, eff October 24, 2013 (the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Rights Act of 1965).

**Editor's Note** — The effective date of Chapter 572, which added this section, is "from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended." However, after the bill was approved, the United States Supreme Court, in the case of *Shelby County v. Holder* (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Because of the *Shelby County* decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. The Supreme Court did not strike down Section 5, so it is still in effect. For that reason, the Mississippi Attorney General's Office submitted Chapter 572 to the United States Attorney General, in order to technically meet the requirements of Section 5 and



fulfill the condition in the effective date of the bill, which will allow the bill to take effect.

By letter dated October 24, 2013, the United States Attorney General responded to the submission of Chapter 572 that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 572 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 572, so Chapter 572 became effective from and after October 24, 2013, the date of the United States Attorney General's response letter.

## ARTICLE 5.

### BOARDS OF TRUSTEES; QUALIFICATIONS, SELECTION AND MEETINGS.

SEC.

37-7-207. Selection and term of trustees of consolidated districts.

### **§ 37-7-207. Selection and term of trustees of consolidated districts.**

(1) All school districts reconstituted or created under the provisions of Article 1 of this chapter, and which lie wholly within one (1) county, but not including municipal separate and countywide districts, shall be governed by a board of five (5) trustees. The first board of trustees of such districts shall be appointed by the county board of education, and the original appointments shall be so made that one (1) trustee shall be appointed to serve until the first Saturday of March following such appointments, one (1) for one (1) year longer, one (1) for two (2) years longer, one (1) for three (3) years longer, and one (1) for four (4) years longer. After such original appointments, the trustees of such school districts shall be elected by the qualified electors of such school districts in the manner provided for in Sections 37-7-223 through 37-7-229, with each trustee to be elected for a term of five (5) years. The five (5) members of the board of trustees of such consolidated school district shall be elected from special trustee election districts by the qualified electors thereof, as herein provided. The board of trustees of any such consolidated school district shall apportion the consolidated school district into five (5) special trustee election districts. The board of trustees of such school district shall place upon its minutes the boundaries determined for the new five (5) trustee election districts. The board of trustees shall thereafter publish the same in a newspaper of general circulation within said school district for at least three (3) consecutive weeks; and after having given notice of publication and recording the same upon the minutes of the board of trustees, said new district lines shall thereafter be effective.

On the first Tuesday after the first Monday in November, in any year in which any consolidated school district shall elect to utilize the authority to create single member election districts, an election shall be held in each such district in this state for the purpose of electing the board of trustees of such district. At said election the member of the said board from District One shall be elected for a term of one (1) year, the member from District Two shall be

elected for a term of two (2) years, the member from District Three shall be elected for a term of three (3) years, the member from District Four shall be elected for a term of four (4) years, and the member from District Five shall be elected for a term of five (5) years. Thereafter, members shall be elected at general elections as vacancies occur for terms of five (5) years each. Trustees elected from single member election districts as provided above shall otherwise be elected as provided for in Sections 37-7-223 through 37-7-229. All members of the said board of trustees shall take office on the first Monday of January following the date of their election. All vacancies which may occur during a term shall be filled by appointment of the consolidated school district trustees, but the person so appointed shall serve only until the next general election following such appointment, at which time a person shall be elected for the remainder of the unexpired term at the same time and in the same manner as a trustee is elected for the full term then expiring. The person so elected to the unexpired term shall take office immediately. Said appointee shall be selected from the qualified electors of the district in which the vacancy occurs. In the event the school district is under conservatorship and no members of the board of trustees remain in office, the Governor shall call a special election to fill the vacancies and the said election will be conducted by the county election commission.

(2) All school districts reconstituted and created under the provisions of Article 1 of this chapter, which embrace territory in two (2) or more counties, but not including municipal separate school districts, shall be governed by a board of five (5) trustees. In making the original appointments, the several county boards of education shall appoint the trustee or trustees to which the territory in such county is entitled, and, by agreement between the county boards concerned, one (1) person shall be appointed to serve until the first Saturday of March following, one (1) for one (1) year longer, one (1) for two (2) years longer, one (1) for three (3) years longer and one (1) for four (4) years longer. Thereafter, such trustees shall be elected as is provided for in Sections 37-7-223 through 37-7-229, for a term of five (5) years. The five (5) members of the board of trustees of such line consolidated school district shall be elected from special trustee election districts by the qualified electors thereof, as herein provided. The existing board of trustees of such line consolidated school district shall apportion the line consolidated school district into five (5) special trustee election districts. The board of trustees shall place upon its minutes the boundaries determined for the new five (5) trustee election districts. The board of trustees shall thereafter publish the same in a newspaper of general circulation within said school district for at least three (3) consecutive weeks; and after having given notice of publication and recording the same upon the minutes of the board of trustees, said new district lines shall thereafter be effective. Provided, however, that in any line consolidated school district encompassing two (2) or more counties created pursuant to Laws, 1953, Extraordinary Session, Chapter 12, Section 8, in which, as a condition precedent to the creation of said district, each county belonging thereto was contractually guaranteed to always have at least one (1) representative on said



board, in order that said condition precedent may be honored and guaranteed, in any year in which the board of trustees of such line consolidated school district does not have at least one (1) member from each county or part thereof forming such district, the board of trustees in such district shall be governed by a board of a sufficient number of trustees to fulfill this guarantee, five (5) of whom shall be elected from the five (5) special trustee election districts which shall be as nearly equal as possible and one (1) member trustee appointed at large from each county not having representation on the elected board. In such cases, the board of supervisors of each county shall make written agreement to guarantee the manner of appointment of at least one (1) representative from each county in the district, placing such written agreement on the minutes of each board of supervisors in each county.

On the first Tuesday after the first Monday in November, in any year in which any line consolidated school district shall elect to utilize the authority to create single member election districts, an election shall be held in each such district in this state for the purpose of electing the board of trustees of such district. At said election the member of the said board from District One shall be elected for a term of one (1) year, the member from District Two shall be elected for a term of two (2) years, the member from District Three shall be elected for a term of three (3) years, the member from District Four shall be elected for a term of four (4) years, and the member from District Five shall be elected for a term of five (5) years. Thereafter, members shall be elected at general elections as vacancies occur for terms of five (5) years each. Trustees elected from single member election districts as provided above shall otherwise be elected as provided for in Sections 37-7-223 through 37-7-229. All members of the said board of trustees shall take office on the first Monday of January following the date of their election. In all elections, the trustee elected shall be a resident and qualified elector of the district entitled to the representation upon the board, and he shall be elected only by the qualified electors of such district. All vacancies which may occur during a term of office shall be filled by appointment of the consolidated line school district trustees, but the person so appointed shall serve only until the next general election following such appointment, at which time a person shall be elected for the remainder of the unexpired term at the same time and in the same manner as the trustee is elected for the full term then expiring. The person so elected to the unexpired term shall take office immediately. In the event the school district is under conservatorship and no members of the board of trustees remain in office, the Governor shall call a special election to fill the vacancies and the said election will be conducted by the county election commission.

**SOURCES:** Codes, 1942, § 6328-07; Laws, 1953, Ex Sess, ch. 12, § 7; Laws, 1964, ch. 391, § 1; Laws, 1966, ch. 409, § 1; Laws, 1966, ch. 410, § 1; Laws, 1968, ch. 400; Laws, 1981, ch. 409, § 1; Laws, 1988, ch. 523, § 1; Laws, 1990, ch. 567, § 1; Laws, 2002, ch. 598, § 4; Laws, 2013, ch. 331, § 3; Laws, 2013, ch. 363, § 3, eff July 16, 2013 (the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Rights Act of 1965).



**Editor's Note** — This section was amended by two bills in 2013. The effective date of each of the two bills that amended this section, Chapter 331 (House Bill No. 975) and Chapter 363 (Senate Bill No. 2779), is “from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended.” However, after the bills were approved, the United States Supreme Court, in the case of *Shelby County v. Holder* (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Because of the *Shelby County* decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. The Supreme Court did not strike down Section 5, so it is still in effect. Chapter 331 was submitted to the United States Attorney General before the *Shelby County* decision was rendered. In a letter dated July 9, 2013, the United States Attorney General responded that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 331 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 331, so Chapter 331 became effective on the date of the response letter from the United States Attorney General, July 9, 2013.

Chapter 363 was not submitted before the *Shelby County* decision, but the Mississippi Attorney General's Office submitted Chapter 363 to the United States Attorney General, in order to technically meet the requirements of Section 5 and fulfill the condition in the effective date of the bill, which will allow the bill to take effect.

By letter dated July 16, 2013, the United States Attorney General responded that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 363 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 363, so Chapter 363 became effective from and after July 16, 2013, the date of the United States Attorney General's response letter. Because that date is later than the date of the response letter for Chapter 331, the version of this section in Chapter 363 is the controlling version of this section.

## CHAPTER 9

### District Superintendents, Principals, Teachers, and Other Employees

#### IN GENERAL

**§ 37-9-59. Grounds and procedure for dismissal or suspension of licensed employee; attendance of different school system by child as ground for denying employment or reemployment of superintendent, principal or licensed employee.**

#### JUDICIAL DECISIONS

1. Suspension and removal—In general.
3. —Principals.
4. —Teachers — In general.
5. — —Insubordination or other good

cause.

**1. Suspension and removal—In general.**

**3. —Principals.**

Good cause supported a principal's termination because the principal knew the school could not buy a fairway mower, yet the principal executed a document purporting to give a high school coach the authority to make such a purchase on the school's behalf, which exceeded the principal's authority and enabled a serious violation of the school board's purchasing policy. *Hester v. Lowndes County Sch. Dist.*, — So. 3d —, 2013 Miss. App. LEXIS 509 (Miss. Ct. App. Aug. 20, 2013).

*Dist.*, — So. 3d —, 2013 Miss. App. LEXIS 509 (Miss. Ct. App. Aug. 20, 2013).

**4. —Teachers — In general.**

**5. — —Insubordination or other good cause.**

Good cause existed for termination of a high school coach because he wrongfully exposed a school district to potential liability in a lease/purchase agreement for a fairway mower when he entered the agreement as a purported agent for the school. *Hester v. Lowndes County Sch. Dist.*, — So. 3d —, 2013 Miss. App. LEXIS 509 (Miss. Ct. App. Aug. 20, 2013).

**§ 37-9-69. General duties of superintendents, principals and teachers.**

**JUDICIAL DECISIONS**

2.5. Duty to protect from bullying.

4. Disorderly conduct.

**2.5. Duty to protect from bullying.**

Miss. Code Ann. § 37-9-69 applied to alleged ministerial acts of negligent failure to enforce school district policies, failure to respond to a student's bullying by other students, and failure to discipline those bullies, thus, Miss. Cod Ann. § 11-46-9(1)(a), (d)'s discretionary immunity did not bar those claims; finding that the alleged conduct was ministerial rather than discretionary did not remove the absolute personal immunity afforded the individual officials for actions committed within the course and scope of employment. *R.S. v. Starkville Sch. Dist.*, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 134264 (N.D. Miss. Sept. 19, 2013).

**4. Disorderly conduct.**

Trial court erred in ruling that, pursuant to Miss. Code Ann. § 11-46-9, discretionary immunity under the Mississippi Torts Claims Act, Miss. Code Ann. § 11-46-1 et seq., barred a personal injury action, because a genuine issue of material fact existed as to whether a school district breached its duty of ordinary care in performing its ministerial duty to maintain discipline and to supervise the students, when one student assaulted another student, as required by the school district's handbook.. *Swindle v. Neshoba County Sch. Dist.*, — So. 3d —, 2013 Miss. App. LEXIS 574 (Miss. Ct. App. Sept. 10, 2013).

**EDUCATION EMPLOYMENT PROCEDURES LAW**

**§ 37-9-111. Hearing.**

**JUDICIAL DECISIONS**

**7. Miscellaneous.**

Since a teacher only filed complaints for original actions, and since the chancery court possessed only appellate jurisdiction,

then the chancery court lacked subject-matter jurisdiction; the teacher failed to file her appeal of the school board's decision in chancery court in accordance

with statutory requirements. *Lacour v. Claiborne County Sch. Dist.*, 119 So. 3d 1128 (Miss. Ct. App. 2013).

## § 37-9-113. Judicial review.

### JUDICIAL DECISIONS

#### 2. Scope of appeal; jurisdiction.

Since a teacher only filed complaints for original actions, and since the chancery court possessed only appellate jurisdiction, then the chancery court lacked subject-matter jurisdiction; the teacher failed to file her appeal of the school board's decision in chancery court in accordance with statutory requirements. *Lacour v. Claiborne County Sch. Dist.*, 119 So. 3d 1128 (Miss. Ct. App. 2013).

Chancery court properly concluded that a teacher's claim for relief was barred by the statute of limitations; since the teacher failed to properly perfect in chancery court an appeal of the school district's decision affirming her termination, and since she failed to obtain federal ancillary jurisdiction over her state-law claim, then no tolling of the statute of limitations occurred with respect to that state-law right of appeal. *Lacour v. Claiborne County Sch. Dist.*, 119 So. 3d 1128 (Miss. Ct. App. 2013).

Chancery court correctly determined that it lacked subject matter jurisdiction because the teacher failed to file her appeal of the school board's decision affirming her termination in accordance with statutory requirements; failure to properly perfect the appeal barred the chancery court's jurisdiction. *Lacour v. Claiborne County Sch. Dist.*, 119 So. 3d 1128 (Miss. Ct. App. 2013).

School board's decision not to renew the employment contract of a former employee was appropriate because the decision was not arbitrary or capricious in that substantial evidence supported the board's decision to eliminate the employee's position as personnel director, and the plain language of the reduction in force policy provided no requirement to offer the employee some other administrative or instructional position. *Carter v. Cleveland Sch. Dist.*, 118 So. 3d 673 (Miss. Ct. App. 2013).

## CHAPTER 17

### Accreditation of Schools

SEC.

37-17-13.

Abolition of school districts declared to be in state of emergency; powers of board of education with regard to such school districts; reconstitution, etc., of districts.

## § 37-17-13. Abolition of school districts declared to be in state of emergency; powers of board of education with regard to such school districts; reconstitution, etc., of districts.

(1) Whenever the Governor declares a state of emergency in a school district in response to a certification by the State Board of Education and the Commission on School Accreditation made under Section 37-17-6(11)(b), the State Board of Education, in addition to any actions taken under Section 37-17-6, may abolish the school district and assume control and administration of the schools formerly constituting the district, and appoint a conservator to carry out this purpose under the direction of the State Board of Education. In



such case, the State Board of Education shall have all powers which were held by the previously existing school board, and the previously existing superintendent of schools or county superintendent of education, including, but not limited to, those enumerated in Section 37-7-301, and the authority to request tax levies from the appropriate governing authorities for the support of the schools and to receive and expend the tax funds as provided by Section 37-57-1 et seq., and Section 37-57-105 et seq.

(2) When a school district is abolished under this section, loans from the School District Emergency Assistance Fund may be made by the State Board of Education for the use and benefit of the schools formerly constituting the district in accordance with the procedures set forth in Section 37-17-6(14) for such loans to the district. The abolition of a school district under this section shall not impair or release the property of that school district from liability for the payment of the loan indebtedness, and it shall be the duty of the appropriate governing authorities to levy taxes on the property of the district so abolished from year to year according to the terms of the indebtedness until same shall be fully paid.

(3) After a school district is abolished under this section, at such time as the State Board of Education determines that the impairments have been substantially corrected, the State Board of Education shall reconstitute, reorganize or change or alter the boundaries of the previously existing district; however, no partition or assignment of territory formerly included in the abolished district to one or more other school districts may be made by the State Board of Education without the consent of the school board of the school district to which such territory is to be transferred, such consent to be spread upon its minutes. At that time, the State Board of Education, in appropriate cases, shall notify the appropriate governing authority or authorities of its action and request them to provide for the election or appointment of school board members in the manner provided by law. In the event the applicable statute provides that vacancies in an all-elected membership of the school board will be filled by appointment by the remaining members of the school board and no members of the school board remain in office, the Governor shall call a special election to fill the vacancies. In such situations, the Governor will set the date of the special election and said election will be conducted by the county election commission. The State Board of Education shall also request the governing authority or authorities to provide for the appointment of a superintendent or superintendents to govern the reconstituted, reorganized or changed district or districts, which such appointed position shall apply in all school districts including those school districts in which the position of superintendent was previously an elected office. A board member or superintendent in office at the time the Governor declares a state of emergency in a school district to be abolished shall not be eligible to serve in that office for the school district reconstituted, reorganized or changed after the Governor declares that an emergency no longer exists.

**SOURCES:** Laws, 1996, ch. 302, § 2; Laws, 1999, ch. 421, § 4; Laws, 2007, ch. 518, § 2, eff. July 23, 2007, the date United States Attorney General interposed no objection, under Section 5 of the Voting rights Act of 1965, to the amendment of this section); Laws, 2012, ch. 525, § 2; Laws, 2013, ch. 331, § 1; Laws, 2013, ch. 363, § 1, eff. July 16, 2013 (the date of the United States Attorney General's response to the submission of this section under Section 5 of the Voting Rights Act of 1965.)

**Editor's Note** — This section was amended by two bills in 2013. The effective date of each of the two bills that amended this section, Chapter 331 (House Bill No. 975) and Chapter 363 (Senate Bill No. 2779), is “from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended.” However, after the bills were approved, the United States Supreme Court, in the case of *Shelby County v. Holder* (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Because of the *Shelby County* decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. The Supreme Court did not strike down Section 5, so it is still in effect. Chapter 331 was submitted to the United States Attorney General before the *Shelby County* decision was rendered. In a letter dated July 9, 2013, the United States Attorney General responded that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 331 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 331, so Chapter 331 became effective on the date of the response letter from the United States Attorney General, July 9, 2013.

Chapter 363 was not submitted before the *Shelby County* decision, but the Mississippi Attorney General's Office submitted Chapter 363 to the United States Attorney General, in order to technically meet the requirements of Section 5 and fulfill the condition in the effective date of the bill, which will allow the bill to take effect.

By letter dated July 16, 2013, the United States Attorney General responded that he is not making determinations on the merits of any bill that is submitted under Section 5. The submission of Chapter 363 and the response from the United States Attorney General technically met the requirements of Section 5 and fulfilled the condition in the effective date of Chapter 363, so Chapter 363 became effective from and after July 16, 2013, the date of the United States Attorney General's response letter. Because that date is later than the date of the response letter for Chapter 331, the version of this section in Chapter 363 is the controlling version of this section.





# TITLE 41

## PUBLIC HEALTH

Chapter 7.	Hospital and Health Care Commissions .....	41-7-1
------------	--	--------

### CHAPTER 7

#### Hospital and Health Care Commissions

Health Care Certificate of Need Law of 1979 .....	41-7-171
---	----------

#### HEALTH CARE CERTIFICATE OF NEED LAW OF 1979

SEC.	
41-7-201.	Direct appeal of final order pertaining to certificate of need to the Mississippi Supreme Court.

#### § 41-7-201. Direct appeal of final order pertaining to certificate of need to the Mississippi Supreme Court.

The provisions of this section shall apply to any party appealing any final order of the State Department of Health pertaining to a certificate of need for any health care facility as defined in Section 41-7-173(h):

(a) There shall be a “stay of proceedings” of any final order issued by the State Department of Health pertaining to the issuance of a certificate of need for the establishment, construction, expansion or replacement of a health care facility for a period of thirty (30) days from the date of the order, if an existing provider located in the same service area where the health care facility is or will be located has requested a hearing during the course of review in opposition to the issuance of the certificate of need. The stay of proceedings shall expire at the termination of thirty (30) days; however, no construction, renovation or other capital expenditure that is the subject of the order shall be undertaken, no license to operate any facility that is the subject of the order shall be issued by the licensing agency, and no certification to participate in the Title XVIII or Title XIX programs of the Social Security Act shall be granted, until all statutory appeals have been exhausted or the time for those appeals has expired. Notwithstanding the foregoing, the filing of an appeal from a final order of the State Department of Health for the issuance of a certificate of need shall not prevent the purchase of medical equipment or development or offering of institutional health services granted in a certificate of need issued by the State Department of Health.

(b) In addition to other remedies now available at law or in equity, any party aggrieved by any such final order of the State Department of Health shall have the right of direct appeal to the Mississippi Supreme Court, which appeal must be filed within twenty (20) days after the date of the final order.

Any appeal shall state briefly the nature of the proceedings before the State Department of Health and shall specify the order complained of.

(c) Upon the filing of such an appeal, the Clerk of the Supreme Court shall serve notice thereof upon the State Department of Health, whereupon the State Department of Health shall, within thirty (30) days of the date of the filing of the appeal, certify to the court the record in the case, which records shall include a transcript of all testimony, together with all exhibits or copies thereof, all pleadings, proceedings, orders, findings and opinions entered in the case; however, the parties and the State Department of Health may stipulate that a specified portion only of the record shall be certified to the court as the record on appeal.

(d) Any appeal of a final order by the State Department of Health in a certificate of need proceeding shall require the giving of a bond by the appellant(s) sufficient to secure the appellee against the loss of costs, fees, expenses and attorney's fees incurred in defense of the appeal, approved by the Supreme Court within five (5) days of the date of filing the appeal.

(e) No new or additional evidence shall be introduced in the Supreme Court, but the case shall be determined upon the record certified to the court.

(f) The Supreme Court may sustain or dismiss the appeal, modify or vacate the order complained of, in whole or in part, and may make an award of costs, fees, expenses and attorney's fees, as the case may be; but in case the order is wholly or partly vacated, the court may also, in its discretion, remand the matter to the State Department of Health for any further proceedings, not inconsistent with the court's order, as, in the opinion of the court, justice may require. The court, as part of the final order, shall make an award of costs, fees, reasonable expenses and attorney's fees incurred in favor of appellee payable by the appellant(s) if the court affirms the order of the State Department of Health. The order shall not be vacated or set aside, either in whole or in part, except for errors of law, unless the court finds that the order of the State Department of Health is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the State Department of Health, or violates any vested constitutional rights of any party involved in the appeal.

(g) Within thirty (30) days from the date of a final order by the Supreme Court that modifies or wholly or partly vacates the final order of the State Department of Health granting a certificate of need, the State Department of Health shall issue another order in conformity with the final order of the Supreme Court.

**SOURCES:** Laws, 1979, ch. 451, § 16; Laws, 1983, ch. 484, § 8; Laws, 1985, ch. 534, § 11; Laws, 1986, ch. 437, § 44; Laws, 1992, ch. 512 § 1; Laws, 1999, ch. 583, § 3; Laws, 2011, ch. 540, § 1, eff from and after July 1, 2011.

**Editor's Note** — This section, as amended by Section 1 of Chapter 540, Laws of 2011, effective from and after July 1, 2011, was held unconstitutional by the Mississippi Supreme Court in *Dialysis Solutions, LLC v. Miss. State Dep't of Health*, 96 So. 3d 713 (Miss. 2012). The section as amended in 2011 is published here as there has been no



legislative action taken to change the law since the court's decision. The text of the section in effect prior to the 2011 amendment is quoted below:

"(1) The provisions of this subsection (1) shall apply to any party appealing any final order of the State Department of Health pertaining to a certificate of need for a home health agency, as defined in Section 41-7-173(h)(ix):

"(a) In addition to other remedies now available at law or in equity, any party aggrieved by any such final order of the State Department of Health shall have the right of appeal to the Chancery Court of the First Judicial District of Hinds County, Mississippi, which appeal must be filed within thirty (30) days after the date of the final order. Provided, however, that any appeal of an order disapproving an application for such a certificate of need may be made to the chancery court of the county where the proposed construction, expansion or alteration was to be located or the new service or purpose of the capital expenditure was to be located. Such appeal must be filed in accordance with the thirty (30) days for filing as heretofore provided. Any appeal shall state briefly the nature of the proceedings before the State Department of Health and shall specify the order complained of. Any person whose rights may be materially affected by the action of the State Department of Health may appear and become a party or the court may, upon motion, order that any such person, organization or entity be joined as a necessary party.

"(b) Upon the filing of such an appeal, the clerk of the chancery court shall serve notice thereof upon the State Department of Health, whereupon the State Department of Health shall, within fifty (50) days or within such additional time as the court may by order for cause allow from the service of such notice, certify to the chancery court the record in the case, which records shall include a transcript of all testimony, together with all exhibits or copies thereof, all pleadings, proceedings, orders, findings and opinions entered in the case; provided, however, that the parties and the State Department of Health may stipulate that a specified portion only of the record shall be certified to the court as the record on appeal.

"(c) No new or additional evidence shall be introduced in the chancery court but the case shall be determined upon the record certified to the court.

"(d) The court may dispose of the appeal in termtimé or vacation and may sustain or dismiss the appeal, modify or vacate the order complained of in whole or in part as the case may be; but in case the order is wholly or partly vacated, the court may also, in its discretion, remand the matter to the State Department of Health for such further proceedings, not inconsistent with the court's order, as, in the opinion of the court, justice may require. The order shall not be vacated or set aside, either in whole or in part, except for errors of law, unless the court finds that the order of the State Department of Health is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the State Department of Health, or violates any vested constitutional rights of any party involved in the appeal. Provided, however, an order of the chancery court reversing the denial of a certificate of need by the State Department of Health shall not entitle the applicant to effectuate the certificate of need until either:

"(i) Such order of the chancery court has become final and has not been appealed to the Supreme Court; or

"(ii) The Supreme Court has entered a final order affirming the chancery court.

"(e) Appeals in accordance with law may be had to the Supreme Court of the State of Mississippi from any final judgment of the chancery court.

"(2) The provisions of this subsection (2) shall apply to any party appealing any final order of the State Department of Health pertaining to a certificate of need for any health-care facility as defined in Section 41-7-173(h), with the exception of any home health agency as defined in Section 41-7-173(h)(ix):

"(a) There shall be a "stay of proceedings" of any final order issued by the State Department of Health pertaining to the issuance of a certificate of need for the establishment, construction, expansion or replacement of a health-care facility for a



period of thirty (30) days from the date of the order, if an existing provider located in the same service area where the health-care facility is or will be located has requested a hearing during the course of review in opposition to the issuance of the certificate of need. The stay of proceedings shall expire at the termination of thirty (30) days; however, no construction, renovation or other capital expenditure that is the subject of the order shall be undertaken, no license to operate any facility that is the subject of the order shall be issued by the licensing agency, and no certification to participate in the Title XVIII or Title XIX programs of the Social Security Act shall be granted, until all statutory appeals have been exhausted or the time for such appeals has expired. Notwithstanding the foregoing, the filing of an appeal from a final order of the State Department of Health or the chancery court for the issuance of a certificate of need shall not prevent the purchase of medical equipment or development or offering of institutional health services granted in a certificate of need issued by the State Department of Health.

“(b) In addition to other remedies now available at law or in equity, any party aggrieved by any such final order of the State Department of Health shall have the right of appeal to the Chancery Court of the First Judicial District of Hinds County, Mississippi, which appeal must be filed within twenty (20) days after the date of the final order. Provided, however, that any appeal of an order disapproving an application for such a certificate of need may be made to the chancery court of the county where the proposed construction, expansion or alteration was to be located or the new service or purpose of the capital expenditure was to be located. Such appeal must be filed in accordance with the twenty (20) days for filing as heretofore provided. Any appeal shall state briefly the nature of the proceedings before the State Department of Health and shall specify the order complained of.

“(c) Upon the filing of such an appeal, the clerk of the chancery court shall serve notice thereof upon the State Department of Health, whereupon the State Department of Health shall, within thirty (30) days of the date of the filing of the appeal, certify to the chancery court the record in the case, which records shall include a transcript of all testimony, together with all exhibits or copies thereof, all pleadings, proceedings, orders, findings and opinions entered in the case; provided, however, that the parties and the State Department of Health may stipulate that a specified portion only of the record shall be certified to the court as the record on appeal. The chancery court shall give preference to any such appeal from a final order by the State Department of Health in a certificate of need proceeding, and shall render a final order regarding such appeal no later than one hundred twenty (120) days from the date of the final order by the State Department of Health. If the chancery court has not rendered a final order within this 120-day period, then the final order of the State Department of Health shall be deemed to have been affirmed by the chancery court, and any party to the appeal shall have the right to appeal from the chancery court to the Supreme Court on the record certified by the State Department of Health as otherwise provided in paragraph (g) of this subsection. In the event the chancery court has not rendered a final order within the 120-day period and an appeal is made to the Supreme Court as provided herein, the Supreme Court shall remand the case to the chancery court to make an award of costs, fees, reasonable expenses and attorney’s fees incurred in favor of appellee payable by the appellant(s) should the Supreme Court affirm the order of the State Department of Health.

“(d) Any appeal of a final order by the State Department of Health in a certificate of need proceeding shall require the giving of a bond by the appellant(s) sufficient to secure the appellee against the loss of costs, fees, expenses and attorney’s fees incurred in defense of the appeal, approved by the chancery court within five (5) days of the date of filing the appeal.

“(e) No new or additional evidence shall be introduced in the chancery court but the case shall be determined upon the record certified to the court.

“(f) The court may dispose of the appeal in termtime or vacation and may sustain or dismiss the appeal, modify or vacate the order complained of in whole or in part and

may make an award of costs, fees, expenses and attorney's fees, as the case may be; but in case the order is wholly or partly vacated, the court may also, in its discretion, remand the matter to the State Department of Health for such further proceedings, not inconsistent with the court's order, as, in the opinion of the court, justice may require. The court, as part of the final order, shall make an award of costs, fees, reasonable expenses and attorney's fees incurred in favor of appellee payable by the appellant(s) should the court affirm the order of the State Department of Health. The order shall not be vacated or set aside, either in whole or in part, except for errors of law, unless the court finds that the order of the State Department of Health is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the State Department of Health, or violates any vested constitutional rights of any party involved in the appeal. Provided, however, an order of the chancery court reversing the denial of a certificate of need by the State Department of Health shall not entitle the applicant to effectuate the certificate of need until either:

“(i) Such order of the chancery court has become final and has not been appealed to the Supreme Court; or

“(ii) The Supreme Court has entered a final order affirming the chancery court.

“(g) Appeals in accordance with law may be had to the Supreme Court of the State of Mississippi from any final judgment of the chancery court.

“(h) Within thirty (30) days from the date of a final order by the Supreme Court or a final order of the chancery court not appealed to the Supreme Court that modifies or wholly or partly vacates the final order of the State Department of Health granting a certificate of need, the State Department of Health shall issue another order in conformity with the final order of the Supreme Court, or the final order of the chancery court not appealed to the Supreme Court.”

## JUDICIAL DECISIONS

### 1.5. Constitutionality.

Miss. Code Ann. § 41-7-201, purporting to allow a health care provider to appeal the Mississippi State Department of Health's (MDH) denial of the provider's application for a certificate of need directly to the supreme court, violated Miss. Const. Art. VI, § 146 because the statute impermissibly conferred original jurisdiction on the supreme court, as, (1) under Miss. Const. Art. I, §§ 1 - 2, the legislature could not confer jurisdiction on courts not given or authorized to be given by the Mississippi Constitution, (2) the “revisory” appellate jurisdiction conferred on the supreme court in Miss. Const. Art. VI,

§ 146 applied only to judicial decisions rendered by a tribunal clothed with judicial power, (3) no certificate of need procedure existed at common law, (4) the nature of a certificate of need proceeding was permit-like and often nonadversarial, and (5) the final order of the MDH was issued by the State Health Officer, who was not statutorily required to be an attorney, under Miss. Code Ann. § 41-3-5.1, so the MDH lacked the indicia to be considered a tribunal of the character from which the legislature was authorized to grant appeals directly to the supreme court. *Dialysis Solutions, LLC v. Miss. State Dep't of Health*, 96 So. 3d 713 (Miss. 2012).

## CHAPTER 9

### Regulation of Hospitals; Hospital Records

#### HOSPITAL RECORDS — USE IN TRIALS AND ADMINISTRATIVE HEARINGS

#### § 41-9-119. Evidence of reasonableness of medical expenses.

##### JUDICIAL DECISIONS

##### 1. In general.

In a personal injury action involving a rear-end vehicle collision, a trial court did not abuse its discretion by denying a motion for an additur by driver 1, who was in the stopped vehicle, because while driver 1's medical bills established a presump-

tion that those bills were reasonable and necessary for the treatment of her injuries, the medical bills were not prima facie evidence that the accident was the proximate cause of driver 1's injuries. *Downs v. Ackerman*, 115 So. 3d 785 (Miss. 2013).

## CHAPTER 29

### Poisons, Drugs and Other Controlled Substances

#### ARTICLE 3.

#### UNIFORM CONTROLLED SUBSTANCES LAW.

#### § 41-29-115. Schedule II of controlled substances.

##### JUDICIAL DECISIONS

3. Evidence — generally; admissibility.

4. —Sufficiency.

3. Evidence — generally; admissibility.

4. —Sufficiency.

Samples of defendant's stomach contents, totaling about 80 grams, that were confirmed to contain methamphetamine

provided sufficient evidence to support defendant's conviction for possession of a controlled substance where the evidence also showed that defendant, when approached by the police, chewed up and swallowed a plastic bag alleged to have contained methamphetamine. *Lamb v. State*, 124 So. 3d 84 (Miss. Ct. App. 2013), writ of certiorari denied by 123 So. 3d 450, 2013 Miss. LEXIS 557 (Miss. 2013).

#### § 41-29-139. Prohibited acts; penalties.

##### JUDICIAL DECISIONS

##### II. ELEMENTS OF OFFENSE.

8. Quantity.

##### IV. EVIDENCE.

22. Sufficient evidence—possession.



23. —Sale or distribution, or intent as to same.

## II. ELEMENTS OF OFFENSE.

### 8. Quantity.

There was sufficient evidence for the jury to conclude that defendant possessed between .1 gram and two grams of methadone because, based on the relatively homogeneous nature of the pill fragments which were recovered, it was not necessary for an examiner for the Mississippi Crime Laboratory, who tested one pill fragment and testified at trial, to have tested every pill fragment. *Fay v. State*, — So. 3d —, 2013 Miss. App. LEXIS 445 (Miss. Ct. App. July 23, 2013).

## IV. EVIDENCE.

### 22. Sufficient evidence—possession.

Weight of the evidence was not against the verdict, as methadone pills were found in a bag in defendant's pocket, when a vehicle in which defendant was a passenger was stopped, and the jury could have chosen not to believe defendant's testimony that the driver, defendant's sibling, had the pills and was merely trying to get rid of them when defendant then put the pills in defendant's pocket. *Fay v. State*, — So. 3d —, 2013 Miss. App. LEXIS 445 (Miss. Ct. App. July 23, 2013).

Defendant's conviction for possession of marijuana was supported by evidence showing that defendant, a passenger in a car, was told that the driver's purpose in his trip was to purchase drugs, defendant knew that the substance the driver purchased was marijuana, he was in the car alone with the marijuana while the driver and another passenger were inside a gas station, and he threw the marijuana out of the car at a checkpoint. *Ferguson v. State*, — So. 3d —, 2013 Miss. App. LEXIS 423 (Miss. Ct. App. July 16, 2013).

Defendant's conviction for possession of a controlled substance was supported by substantial evidence that included the

fact that three police officers personally observed defendant chew up and swallow a plastic bag containing methamphetamine and that when his stomach contents were removed, samples totaling 80 grams were confirmed by laboratory analysis to contain methamphetamine. *Lamb v. State*, 124 So. 3d 84 (Miss. Ct. App. 2013), writ of certiorari denied by 123 So. 3d 450, 2013 Miss. LEXIS 557 (Miss. 2013).

### 23. —Sale or distribution, or intent as to same.

Evidence was sufficient to convict defendant of possession of an illegal, controlled substance with the intent to sell, manufacture, or distribute that illegal substance because defendant had actual possession of the ecstasy as the detective testified that he witnessed defendant throw a clear bag with a blue substance to the wall of the residence while the detective was just outside of it, and the field-test conclusion that the pills were ecstasy was confirmed by the crime lab; and because defendant intended to distribute the drugs as the detective testified that the 21 ecstasy pills found on defendant, in an area known for heavy drug trafficking, was an amount inconsistent with personal consumption. *Cooper v. State*, — So. 3d —, 2013 Miss. App. LEXIS 686 (Miss. Ct. App. Oct. 15, 2013).

Defendant's conviction for selling cocaine in violation of this section was not against the weight of the evidence because a confidential informant testified that he purchased cocaine from defendant and his testimony was corroborated by testimony of police officers; although the audio and video tapes of their meeting did not explicitly refer to drugs or show an exchange, the informant possessed an amount of cocaine afterwards that he did not have prior to his meeting with defendant. *Wallace v. State*, — So. 3d —, 2013 Miss. App. LEXIS 627 (Miss. Ct. App. Sept. 24, 2013).

**§ 41-29-152. Enhancement of penalty for violations of Uniform Controlled Substances Law while in possession of firearm; “firearm” defined.**

**JUDICIAL DECISIONS**

**2. Firearm possession.**

Appellant's suit against the State for wrongful conviction and imprisonment for possession of a firearm by a convicted felon was properly dismissed; his claim that the firearm was inoperable was unavailing because he offered no evidence

that it could not be readily converted to expel a projectile, and Miss. Code Ann. § 97-37-5(1) did not require the State to prove that it was operable at the time of his arrest. *Hymes v. State*, 121 So. 3d 938 (Miss. Ct. App. 2013).

**§ 41-29-153. Forfeitures.**

**JUDICIAL DECISIONS**

**4. Proximity presumption.**

Forfeiture of money was not grossly disproportionate to the amount of marijuana that was found in a vehicle because the value of the illegal drugs involved would have been approximately equal to the value of the money; through the statutory presumption and other evidence, the money was shown to either be the proceeds of a recent drug sale or to be intended for the purchase of drugs. Twenty Thousand Eight Hundred Dollars \$20,800.00 in U.S. Currency v. State ex rel. Miss. Bureau of Narcotics, 115 So. 3d 137 (Miss. Ct. App. 2013).

Trial court did not err in applying the presumption contained in subsection (a)(7), and claimants did not rebut the presumption because money was found in bundles on a claimant's person, in a suitcase in the back seat of a vehicle, and in the center console, and claimants had no documentation for the cash; claimants had tattoos that were associated with a gang known for drug trafficking, and the trial court did not find their testimony credible. Twenty Thousand Eight Hundred Dollars \$20,800.00 in U.S. Currency v. State ex rel. Miss. Bureau of Narcotics, 115 So. 3d 137 (Miss. Ct. App. 2013).

**CHAPTER 41**

**Surgical or Medical Procedures; Consents**

**UNIFORM HEALTH-CARE DECISIONS ACT**

**§ 41-41-211. Surrogates.**

**JUDICIAL DECISIONS**

**1. Arbitration agreements.**

Decedent's estate and wrongful death beneficiaries were not bound by an arbitration agreement signed by an administratrix as part of the decedent's admission to a nursing home because the administratrix was not the decedent's health-care surrogate under Miss. Code Ann. § 41-41-

211(1), did not possess actual authority over the decedent, and did not have the apparent authority to bind the decedent to the contract; the record was utterly devoid of any acts or conduct of the decedent indicating that the administratrix was his agent for the purpose of making health-care decisions. Because a valid contract

did not exist, a third-party beneficiary could not have existed, and thus no arbitration provision existed between the de-

cedent and the nursing home. *Gnsc Batesville, LLC v. Johnson*, 109 So. 3d 562 (Miss. 2013).

## CHAPTER 57

### Vital Statistics

#### BIRTHS AND DEATHS

#### § 41-57-23. Proceedings to correct birth certificate containing major deficiencies.

#### JUDICIAL DECISIONS

##### 1. In general.

Chancellor erred by changing a child's surname on the child's birth certificate in a grandparent visitation proceeding because Miss. Code Ann. § 41-57-23 ap-

plied, but the Mississippi State Board of Health was not included as a necessary party. *Arrington v. Thrash*, 122 So. 3d 144 (Miss. Ct. App. 2013).





# **TITLE 43**

## **PUBLIC WELFARE**

### **CHAPTER 19**

#### **Support of Natural Children**

#### **CHILD SUPPORT UNIT**

**§ 43-19-33. Force and effect of written stipulated agreement to support and written admission of paternity containing agreement of support.**

#### **JUDICIAL DECISIONS**

**1. In general.**

Chancery court did not abuse its discretion by declining to require a parent to provide post-majority financial support for the parent's child because Mississippi

law did not vest the court with the authority to mandate that parents financially support their offspring post-majority. *Hays v. Alexander*, 114 So. 3d 704 (Miss. 2013).

**§ 43-19-34. Stipulated agreement for modification of support order; Child Support Unit authorized to send motion and notice of intent to modify; reviews for possible modification to be conducted on 3-year cycle; only upward adjustments to be ordered retroactively; noncustodial parent's arrearage not to bar review or downward modification.**

#### **JUDICIAL DECISIONS**

**3. Retroactive downward modification of support prohibited.**

Chancellor did not err in temporarily reducing the father's child support for a year because he could pay the amount he had voluntarily agreed was needed to support his two children by rearranging his

priorities, financial affairs, and employment; however, downward retroactive modification of child support was prohibited. *Frazier v. Frazier*, — So. 3d —, 2013 Miss. App. LEXIS 395 (Miss. Ct. App. June 25, 2013).

#### **CHILD SUPPORT AWARD GUIDELINES**

**§ 43-19-101. Child support award guidelines.**

#### **JUDICIAL DECISIONS**

**1. In general.**

2.5. Guidelines; adherence to.

3. Guidelines; deviation from.

4. Findings of fact.

## 6. Modification of support.

### 1. In general.

It was within a chancellor's discretion to find that a former spouse's adjusted gross income was not to be calculated based on an earning potential that the spouse, who was an emergency room physician, could only realize by working additional shifts at a hospital and thereby placing the spouse's patients in potential danger from the spouse's fatigue. *Crittenden v. Crittenden*, — So. 3d —, 2013 Miss. App. LEXIS 855 (Miss. Ct. App. Dec. 10, 2013).

### 2.5. Guidelines; adherence to.

Because the husband received custody of the couple's two minor children and the chancellor actually valued the wife's adjusted gross income rather conservatively, considering that some evidence suggested that the wife's parents gave her more than \$3,000 per month, the chancellor did not err in ordering the wife to pay the husband child support in the amount of 20 percent of her adjusted gross income. *Houston v. Houston*, 121 So. 3d 283 (Miss. Ct. App. 2013).

### 3. Guidelines; deviation from.

Chancellor did not err by holding that an upward deviation of a former spouse's child-support obligation was warranted, given the lifestyle to which the four children living with the other former spouse were accustomed. *Crittenden v. Crittenden*, — So. 3d —, 2013 Miss. App. LEXIS 855 (Miss. Ct. App. Dec. 10, 2013).

Chancellor did not err, under Miss. Code Ann. § 43-19-103, by requiring a parent to pay monthly child support greater than the fourteen percent of the parent's adjusted-gross income prescribed by Miss. Code Ann. § 43-19-101 because the subject child had to go to day-care for the other parent to retain employment, and the parents each lived rent free with one or both of their own parents. *Marin v. Stewart*, 122 So. 3d 153 (Miss. Ct. App. 2013).

### 4. Findings of fact.

Chancellor did not err by failing to provide a written finding stating whether the application of a statutory guideline was reasonable because the chancellor ultimately

provided a thoroughly written finding explaining the application of the statutory guideline in determining the appropriate child support, and there was nothing on the issue for the chancellor to address that the chancellor did not address in the chancellor's final judgment. *Stout v. Stout*, — So. 3d —, 2013 Miss. App. LEXIS 854 (Miss. Ct. App. Dec. 10, 2013).

In calculating child support, the trial court abused its discretion in attributing any future rental income to the husband, as it had awarded the rental property to the wife. *Collins v. Collins*, 112 So. 3d 428 (Miss. 2013).

In calculating child support, the trial court erred in arbitrarily determining a husband's monthly income to exclusion of the undisputed evidence he provided, due to his failure to comply with Miss. Unif. Ch. Ct. R. 8.05, because the remedy for his violation was to hold him in contempt, not to disregard the credible evidence he provided. *Collins v. Collins*, 112 So. 3d 428 (Miss. 2013).

## 6. Modification of support.

Without any information to determine what the chancery court considered in modifying the father's child-support obligation, the appellate court was unable to determine whether there was an abuse of discretion, and the chancery court committed reversible error in modifying the father's child support obligation. *Curry v. Frazier*, 119 So. 3d 362 (Miss. Ct. App. 2013).

In determining a father's child support obligation upon granting an upward modification, the trial court properly gave him a credit for taxes, which amounted to a deduction from his monthly gross income, as well as other credits for support paid to his other children and payments for health insurance for all of his children. *Williams v. Dep't of Human Servs.*, 116 So. 3d 176 (Miss. Ct. App. 2013).

Trial court properly calculated the father's adjusted gross income for purposes of an upward modification of his child-support payment, as the inclusion of his overtime pay was proper where it was reasonable to anticipate that he would receive overtime wages in the future, and other appropriate deductions were made.



Williams v. Dep't of Human Servs., 116 So. 3d 176 (Miss. Ct. App. 2013).

**§ 43-19-103. Criteria for overcoming presumption that guidelines are appropriate.**

**JUDICIAL DECISIONS**

**1. In general.**

Social Security benefits which a parent received on behalf of the parent's other child, whose other parent was deceased, was not a reason to decrease the obligor parent's child-support obligations, because the benefits belonged to the parent's other child, not the obligor parent's child. *Marin v. Stewart*, 122 So. 3d 153 (Miss. Ct. App. 2013).

Chancellor did not err by requiring a parent to pay monthly child support

greater than the fourteen percent of the parent's adjusted-gross income prescribed by Miss. Code Ann. § 43-19-101 because the subject child had to go to day-care for the other parent to retain employment, and the parents each lived rent free with one or both of their own parents. *Marin v. Stewart*, 122 So. 3d 153 (Miss. Ct. App. 2013).

**CHAPTER 21**

**Youth Court**

**ORGANIZATION, ADMINISTRATION AND OPERATION**

**§ 43-21-105. Definitions.**

**JUDICIAL DECISIONS**

**I. Under Current Law.**

**3.5. Parent.**

**I. Under Current Law.**

**3.5. Parent.**

Foster parents did not meet the definition of "parents," and therefore, a youth

court erred in assessing guardian ad litem fees against the foster parents. In the *Interest of S.L.B.*, 122 So. 3d 1239 (Miss. Ct. App. 2013).

## RECORDS

### § 43-21-251. Court records.

#### JUDICIAL DECISIONS

##### I. Under Current Law.

1. In general.
- 2.-3. [Reserved for future use.]

##### I. Under Current Law.

##### 1. In general.

Youth court erred by imposing a gag order in a child custody proceeding because it failed to consider any balancing test before imposing the gag order, thus, there existed no imminent danger to a compelling interest of such magnitude that the restraint on the parties' speech was warranted. *Cruz v. Jackson County, Dep't of Human Servs. (In the Interest of R.J.M.B.)*, — So. 3d —, 2013 Miss. LEXIS 305 (Miss. May 23, 2013).

Issue of confidentiality of youth court records was not moot because a federal

court did not seal its records since Miss. Code Ann. § 43-21-261 still had the effect of limiting the public's ability to view, copy, or otherwise disseminate the youth-court records for any other reason. *Cruz v. Jackson County, Dep't of Human Servs. (In the Interest of R.J.M.B.)*, — So. 3d —, 2013 Miss. LEXIS 305 (Miss. May 23, 2013).

Youth court did not abuse its discretion in ordering that the youth court records in a child custody proceeding remain confidential because the mother could not expressly waive record confidentiality just because she was a parent. *Cruz v. Jackson County, Dep't of Human Servs. (In the Interest of R.J.M.B.)*, — So. 3d —, 2013 Miss. LEXIS 305 (Miss. May 23, 2013).

##### 2.-3. [Reserved for future use.]

### § 43-21-261. Disclosure of records.

#### JUDICIAL DECISIONS

##### 3. Right to records.

Youth court erred by imposing a gag order in a child custody proceeding because it failed to consider any balancing test before imposing the gag order, thus, there existed no imminent danger to a compelling interest of such magnitude that the restraint on the parties' speech was warranted. *Cruz v. Jackson County, Dep't of Human Servs. (In the Interest of R.J.M.B.)*, — So. 3d —, 2013 Miss. LEXIS 305 (Miss. May 23, 2013).

Issue of confidentiality of youth court records was not moot because a federal court did not seal its records since Miss. Code Ann. § 43-21-261 still had the effect

of limiting the public's ability to view, copy, or otherwise disseminate the youth-court records for any other reason. *Cruz v. Jackson County, Dep't of Human Servs. (In the Interest of R.J.M.B.)*, — So. 3d —, 2013 Miss. LEXIS 305 (Miss. May 23, 2013).

Youth court did not abuse its discretion in ordering that the youth court records in a child custody proceeding remain confidential because the mother could not expressly waive record confidentiality just because she was a parent. *Cruz v. Jackson County, Dep't of Human Servs. (In the Interest of R.J.M.B.)*, — So. 3d —, 2013 Miss. LEXIS 305 (Miss. May 23, 2013).

CHAPTER 31

Poor Persons

**§ 43-31-25. Certain relatives bound to support pauper; liability of deceased pauper's estate.**

**JUDICIAL DECISIONS**

**1. In general.**

Chancery court did not abuse its discretion by declining to require a parent to provide post-majority financial support for the parent's child because Mississippi

law did not vest the court with the authority to mandate that parents financially support their offspring post-majority. *Hays v. Alexander*, 114 So. 3d 704 (Miss. 2013).





## TITLE 47

# PRISONS AND PRISONERS; PROBATION AND PAROLE

## CHAPTER 5

### Correctional System

#### OFFENDERS

**§ 47-5-139. Certain inmates ineligible for earned time allowance; commutation to be based on total term of sentences; forfeiture of earned time in event of escape.**

#### JUDICIAL DECISIONS

##### **2. Constitutional issues.**

Where a juvenile convicted of murder receives a life sentence, conditional release does not satisfy the mandate of *Miller v. Alabama*, 2012 U.S. LEXIS 4873, because conditional release is more akin to clemency, which is different from parole

despite some surface similarities, and conditional release would not be determined by the sentencing authority at the time of sentencing based on age and other characteristics, as *Miller* mandates. *Parker v. State*, 119 So. 3d 987 (Miss. 2013).

#### ALCOHOLIC BEVERAGES, CONTROLLED SUBSTANCES, NARCOTIC DRUGS, WEAPONS, AND OTHER CONTRABAND

**§ 47-5-193. Prohibitions generally.**

#### JUDICIAL DECISIONS

1. Evidence.
2. — Sufficient.

##### **1. Evidence.**

##### **2. — Sufficient.**

Overwhelming weight of the evidence supported jury's conviction of defendant

for possession of a cell phone within a correctional facility. The evidence established that during a search of defendant, a cell phone fell out of his pants and that a twenty-two minute call had been made on the phone to one of defendant's family members. *Pruitt v. State*, 122 So. 3d 806 (Miss. Ct. App. 2013).

## CHAPTER 7

### Probation and Parole

#### PROBATION AND PAROLE LAW

### § 47-7-3. Parole of prisoners; conditions for eligibility; determination of tentative hearing date; reconsideration of rejected applications after one year on convictions for nonviolent crimes.

#### JUDICIAL DECISIONS

2. Constitutionality.
8. Miscellaneous.
10. Sex offenders.

#### 2. Constitutionality.

Based on *Miller v. Alabama*, 132 S. Ct. 2445 (2012), *Parker v. State*, 119 So. 3d 987 (Miss. 2013), and *Jones v. State*, 122 So. 3d 698 (Miss. 2013), an inmate who was 17 years old at the time he was involved in the robbery that led to his capital murder guilty plea and a sentence of life in prison without eligibility for parole was entitled to a new sentencing hearing to consider a sentence that would allow parole. *Thomas v. State*, — So. 3d —, 2014 Miss. App. LEXIS 16 (Miss. Ct. App. Jan. 14, 2014).

Trial court properly dismissed appellant's suit alleging the Mississippi Parole Board's denial of his parole was racially motivated and biased, as he did not present evidence that established a violation of his equal-protection rights by the Board in its application of the parole statutes based on his suspect classification. *Wilde v. Miss. Parole Bd.*, — So. 3d —, 2013 Miss. App. LEXIS 780 (Miss. Ct. App. Nov. 19, 2013).

This section does not violate the *Miller* mandate so long as the sentencing authority accounts for characteristics and circumstances unique to juveniles. *Jones v. State*, 122 So. 3d 698 (Miss. 2013).

As defendant was 15 at the time of the murder and was statutorily ineligible for parole, and as *Miller v. Alabama*, 2012 U.S. LEXIS 4873, was decided while his

appeal was pending, his life sentence was vacated and the case was remanded so the trial court could consider the *Miller* factors before determining sentence. *Parker v. State*, 119 So. 3d 987 (Miss. 2013).

Miss. Code Ann. § 47-7-3(1)(h) can constitutionally be applied to juveniles provided that the sentencing authority considers the factors of *Miller v. Alabama*, 2012 U.S. LEXIS 4873, in imposing the sentence. *Parker v. State*, 119 So. 3d 987 (Miss. 2013).

#### 8. Miscellaneous.

Trial court did not err in dismissing appellant's motion for post-conviction relief because no evidence was presented that appellant was misinformed during his sentencing hearing; under Miss. Code Ann. § 47-7-3(1)(h) appellant was not eligible for parole, and the trial court stated repeatedly at the sentencing hearing that the only sentence that could be imposed was life imprisonment. *Collier v. State*, 112 So. 3d 1088 (Miss. Ct. App. 2013).

#### 10. Sex offenders.

Defendant's sentence of thirty-five years in prison, with thirty years to serve and five years suspended, followed by five years' supervised probation, without the possibility of parole, was permissible under Miss. Code Ann. § 47-7-3(1)(b), although Miss. Code Ann. § 97-3-101(3) did not expressly authorize day-for-day sentences and parole restrictions. *Petty v. State*, 118 So. 3d 659 (Miss. Ct. App. 2013).



# TITLE 49

## CONSERVATION AND ECOLOGY

Chapter 7.	Hunting and Fishing .....	49-7-1
------------	---------------------------	--------

### CHAPTER 7

#### Hunting and Fishing

In General.....		49-7-1
-----------------	--	--------

#### IN GENERAL

SEC.  
49-7-10.            Repealed.

#### § 49-7-10.    Repealed.

Repealed by its own terms effective July 1, 2012.

§ 49-7-10. [Laws, 2010, ch. 384, § 1, eff from and after July 1, 2010.]

**Editor's Note** — Former § 49-7-10 permitted an owner of a pier in public or private waters to obtain an annual group pier fishing license.

A former § 49-7-10 [Laws, 1993, ch. 603, § 1; Repealed by Laws 1994, ch. 578, § 65, effective from and after July 1, 1994] related to marine water and saltwater licensing requirements. Similar provisions are found in § 49-15-313.



# **TITLE 53**

## **OIL, GAS, AND OTHER MINERALS**

### **CHAPTER 1**

#### **State Oil and Gas Board**

#### **IN GENERAL**

### **§ 53-1-17. Powers of board.**

#### **JUDICIAL DECISIONS**

- 3.5 State preemption.
- 5. Miscellaneous.

#### **3.5 State preemption.**

Forrest County Board of Supervisors had the authority to enact a fencing ordinance under the home rule statute and the ordinance was not preempted by state law since: (1) the Mississippi legislature had not expressly granted the Mississippi Oil and Gas Board (OGB) the exclusive authority to address industry safety issues; (2) the ordinance was not inconsistent with state oil and gas statutes and regulations; and (3) the OGB had not promulgated any regulation prohibiting perimeter fencing. *Delphi Oil, Inc. v. Forrest County Bd. of Supervisors*, 114 So. 3d 719 (Miss. 2013).

#### **5. Miscellaneous.**

Forrest County fencing ordinance that required perimeter fencing around oil and gas facilities did not materially impede the Mississippi Oil and Gas Board's authority to make inspections of oil and gas sites and the requirement that the Mississippi State Oil and Gas supervisor and his representatives to have access to all wells drilled for oil and gas at any and all times in light of the public policy considerations of protecting private property and the health and safety of Forrest County citizens cited by the Forrest County Board of Supervisors in adopting the ordinance. *Delphi Oil, Inc. v. Forrest County Bd. of Supervisors*, 114 So. 3d 719 (Miss. 2013).

### **§ 53-1-33. Supervisor and his representatives to have access to all wells.**

#### **JUDICIAL DECISIONS**

- 1.-2. [Reserved for future use.]
- 3. Access not impeded.

#### **1.-2. [Reserved for future use.]**

#### **3. Access not impeded.**

Forrest County fencing ordinance that required perimeter fencing around oil and gas facilities did not materially impede the Mississippi Oil and Gas Board's authority to make inspections of oil and gas sites and the requirement that the Missis-

sippi State Oil and Gas supervisor and his representatives to have access to all wells drilled for oil and gas at any and all times in light of the public policy considerations of protecting private property and the health and safety of Forrest County citizens cited by the Forrest County Board of Supervisors in adopting the ordinance. *Delphi Oil, Inc. v. Forrest County Bd. of Supervisors*, 114 So. 3d 719 (Miss. 2013).



ADMINISTRATION EXPENSE TAX

§ 53-1-71. Definitions for §§ 53-1-73 to 53-1-77.

JUDICIAL DECISIONS

1. School districts.

Under Miss. Code Ann. §§ 53-1-73 and 53-1-75, a school district was liable for administrative expense taxes on its royalty interests derived from oil and gas production on sixteenth-section land because the assessments were fees rather than taxes, Miss. Code Ann. § 53-1-71

expressly made the state and its subdivisions subject to the fees, and no constitutional provision or other law was violated by requiring school districts to pay the fees. Jones County Sch. Dist. v. Miss. Dep't of Revenue, 111 So. 3d 588 (Miss. 2013).

§ 53-1-73. Charge imposed to pay for administration expenses.

JUDICIAL DECISIONS

1. Liability for administrative fees.

Under Miss. Code Ann. §§ 53-1-73 and 53-1-75, a school district was liable for administrative expense taxes on its royalty interests derived from oil and gas production on sixteenth-section land because the assessments were fees rather than taxes, Miss. Code Ann. § 53-1-71

expressly made the state and its subdivisions subject to the fees, and no constitutional provision or other law was violated by requiring school districts to pay the fees. Jones County Sch. Dist. v. Miss. Dep't of Revenue, 111 So. 3d 588 (Miss. 2013).

§ 53-1-75. Persons liable.

JUDICIAL DECISIONS

1. School districts.

Under Miss. Code Ann. §§ 53-1-73 and 53-1-75, a school district was liable for administrative expense taxes on its royalty interests derived from oil and gas production on sixteenth-section land because the assessments were fees rather than taxes, Miss. Code Ann. § 53-1-71

expressly made the state and its subdivisions subject to the fees, and no constitutional provision or other law was violated by requiring school districts to pay the fees. Jones County Sch. Dist. v. Miss. Dep't of Revenue, 111 So. 3d 588 (Miss. 2013).

## CHAPTER 3

## Development, Production and Distribution of Gas and Oil

## IN GENERAL

**§ 53-3-7. Integration of interests; pooling agreements and orders.**

## JUDICIAL DECISIONS

2. Pooling agreements—In general.

4. —Forced pooling.

**2. Pooling agreements—In general.****4. —Forced pooling.**

Property owner became eligible to participate in a proposed oil and gas well on the same costs basis as the consenting owners because the owner acted in the

manner and within the time frame prescribed by Miss. Code Ann. § 53-3-7, tendered a check to the operator in the amount of its proportionate share of the dry-hole costs for drilling the well, and agreed in writing to advance its share of the completion costs to the operator. *Tellus Operating Group, LLC v. Maxwell Energy, Inc.*, — So. 3d —, 2013 Miss. App. LEXIS 594 (Miss. Ct. App. Sept. 17, 2013).





## TITLE 63

# MOTOR VEHICLES AND TRAFFIC REGULATIONS

Chapter 21. Motor Vehicle Titles .....	63-21-1
--	---------

## CHAPTER 3

### Traffic Regulations and Rules of the Road

#### ARTICLE 9.

##### ACCIDENTS AND REPORTS.

### § 63-3-401. Duties of driver involved in accident resulting in personal injury or death; offenses and penalties.

#### JUDICIAL DECISIONS

1. Indictment — held sufficient.
2. Double jeopardy.

#### 1. Indictment — held sufficient.

That an indictment charging appellant with aggravated assault and leaving the scene of the accident did not state the location of the incident and whether the victims were pedestrians did not entitle him to post-conviction collateral relief, because he demonstrated no uncertainty as to these facts during his testimony at his sentencing hearing, and he waived any non-jurisdictional defects in the indictment when he pled guilty. *Fox v. State*, — So. 3d —, 2013 Miss. App. LEXIS 223 (Miss. Ct. App. Apr. 30, 2013), writ of certiorari denied by 2014 Miss. LEXIS 78 (Miss. Jan. 30, 2014).

Indictment charging appellant with

leaving the scene of the accident was sufficient and not vague; as it included the phrase “wilfully, unlawfully, and feloniously,” it was apparent that he was charged under the felony, not the misdemeanor, portion of Miss. Code Ann. § 63-3-401. *Fox v. State*, — So. 3d —, 2013 Miss. App. LEXIS 223 (Miss. Ct. App. Apr. 30, 2013), writ of certiorari denied by 2014 Miss. LEXIS 78 (Miss. Jan. 30, 2014).

#### 2. Double jeopardy.

Double Jeopardy Clause was not violated because the drunk-driving statute established separate crimes for each of the victims identified and the offense of leaving the scene of an accident contained different elements from the offenses established by the drunk-driving statute. *Buckner v. State*, — So. 3d —, 2013 Miss. App. LEXIS 682 (Miss. Ct. App. Oct. 15,

2013).

ARTICLE 17.

RIGHT-OF-WAY.

§ 63-3-805. Vehicle entering through highway.

JUDICIAL DECISIONS

- 5. Negligence — In general.
- 7. —Comparative negligence.

5. Negligence — In general.

7. —Comparative negligence.

Circuit court did not err, pursuant to Miss. Code Ann. §§ 85-5-7(5) and 63-3-805, in refusing an apportionment-of-fault

jury instruction because the uncontested evidence presented at trial demonstrated that it was one motorist's negligence that was the sole proximate cause of the accident at an intersection and the injuries sustained by the other motorist and the other motorist's spouse. *Dunnam v. Abney*, — So. 3d —, 2013 Miss. App. LEXIS 770 (Miss. Ct. App. Nov. 12, 2013).

ARTICLE 25.

RECKLESS OR CARELESS DRIVING AND MISCELLANEOUS RULES.

§ 63-3-1213. Careless driving.

JUDICIAL DECISIONS

- 3. Probable cause.
- 5. Evidence sufficient.

3. Probable cause.

Testimony from the arresting officer that he observed defendant's truck pass so close to a deputy that the outside mirror could have struck the officer and that the truck then ran off the road provided sufficient probable cause for a traffic stop based on careless driving. *Ludwig v. State*, 122 So. 3d 1229 (Miss. Ct. App. 2013).

5. Evidence sufficient.

Evidence was sufficient to support defendant's convictions of running a red light and careless driving where a police officer testified that she observed defendant drive his entire vehicle over a concrete median and saw him run a red light. *Lobo v. City of Ridgeland*, — So. 3d —, 2013 Miss. App. LEXIS 300 (Miss. Ct. App. May 28, 2013).

## CHAPTER 11

## Implied Consent Law

**§ 63-11-5. Implied consent to chemical tests; administration of tests; warnings; form of traffic tickets, citations or affidavits; advice regarding right to request legal or medical assistance; rules and regulations.**

## JUDICIAL DECISIONS

**6. Jury instructions.**

Trial court did not err in giving its instruction on defendant's refusal to submit to a breath test as the instruction tracked the language of Miss. Code Ann. § 63-11-5 (Supp. 2012) and did not violate

defendant's U.S. Const. amend. V prosecution against self-incrimination. *Merritt v. State*, 127 So. 3d 1150 (Miss. Ct. App. 2013), writ of certiorari denied by 2014 Miss. LEXIS 14 (Miss. Jan. 9, 2014).

**§ 63-11-8. Testing of motor vehicle operator involved in accident resulting in death.**

## JUDICIAL DECISIONS

**3. Time for test.**

Defendant's conviction of driving under the influence causing death was appropriate because there was no evidence that police officers deliberately delayed defendant's blood alcohol test, as they had acted immediately in obtaining a subpoena and traveling to Memphis to get a blood

sample from defendant, and there was no evidence that defendant was prejudiced by the delay. Moreover, while probable cause existed to test defendant, probable cause did not exist to test the other driver. *Andino v. State*, 125 So. 3d 700 (Miss. Ct. App. 2013).

**§ 63-11-30. Operation of vehicle while under influence of intoxicating liquor or other substances impairing ability to operate vehicle or with blood alcohol concentrations above specified levels; penalties; granting of hardship driving privileges; concurrent running of suspensions; separate offense of endangering child by driving under influence; penalties.**

## JUDICIAL DECISIONS

9. Sufficiency of evidence.

11. Double jeopardy.

14. Miscellaneous.

**9. Sufficiency of evidence.**

Although defendant produced evidence that his truck's power steering had been replaced, the manner in which he handled

an incident he blamed on his power steering going out (failing to stop to inform anyone of the incident) supported a finding that defendant was under the influence at the time he hit mailboxes and a boat. *Chapman v. State*, 126 So. 3d 959 (Miss. Ct. App. 2013).



Evidence supported defendant's conviction of felony driving under the influence causing death because (1) surveillance videos showed that defendant consumed six beers at a casino in a two hour period; (2) defendant, upon leaving the casino, turned defendant's vehicle into an oncoming vehicle; (3) a passenger in the other vehicle was killed; (4) a police officer testified that defendant showed signs of intoxication; and (5) defendant's blood contained .14 percent concentration of alcohol. *Andino v. State*, 125 So. 3d 700 (Miss. Ct. App. 2013).

Sufficient evidence was presented to allow a reasonable and fair-minded juror to find that defendant operated a motor vehicle under circumstances indicating that he was impaired by alcohol because defendant testified that he had consumed alcohol on the day he was arrested, and the State presented testimony that several empty beer cans and a half-full beer can were found in his car and that he smelled like alcohol when he was pulled over. *Young v. State*, 119 So. 3d 309 (Miss. 2013).

There was not a sufficient factual basis, pursuant to Miss. Unif. Cir. & Cty. R. 8.04, to support defendant's guilty plea to driving under the influence (DUI) manslaughter and DUI mayhem because there was no factual basis that defendant had been driving in the county where the accident occurred, that defendant was impaired by controlled substances while defendant was driving, and that defendant performed a negligent act that caused one child's death and another child's serious bodily injury in an auto accident. *Porter v. State*, 126 So. 3d 68 (Miss. Ct. App. 2013).

Evidence supported defendant's driving under the influence conviction because defendant admitted to having been drinking, defendant's performance on field sobriety tests suggested that defendant was impaired, and a video of defendant at a police department waiting to take an Intoxilyzer breath exam depicted defendant as unsteady, eventually losing balance and falling off a stool, while defendant presented part of the video of what defendant alleged was a seizure, without any other support. *Carlson v. City of Ridgeland*, — So. 2d —, 2013 Miss. App. LEXIS 474 (Miss. Ct. App. Aug. 6, 2013).

Evidence was sufficient to support defendant's driving under the influence conviction where two police officers smelled alcohol emitting from defendant's vehicle, defendant exhibited physical signs of impairment during field sobriety tests, and defendant refused to submit to an Intoxilyzer test, which was admissible pursuant to Miss. Code Ann. § 63-11-41. *Lobo v. City of Ridgeland*, — So. 3d —, 2013 Miss. App. LEXIS 300 (Miss. Ct. App. May 28, 2013).

Evidence was sufficient to convict defendant of DUI, first offense, even without the results of a breathalyzer test, where the arresting officer testified defendant admitted to drinking five alcoholic beverages, he smelled like alcohol, his speech was slurred, he swayed while standing, and his eyes were bloodshot and watery. *Ludwig v. State*, 122 So. 3d 1229 (Miss. Ct. App. 2013).

Trial court did not err in denying defendant's motion for judgment notwithstanding the verdict because ample evidence was offered in the form of testimony from the sole testifying witness, a police officer, with regard to defendant's condition on the morning in question; the officer's observations of defendant during the field-sobriety tests were ample proof that defendant's ability to operate her motor vehicle had been impaired by her admitted consumption of alcohol. *Huhn v. City of Brandon*, 121 So. 3d 947 (Miss. Ct. App. 2013).

### 11. Double jeopardy.

Double Jeopardy Clause was not violated because the drunk-driving statute established separate crimes for each of the victims identified and the offense of leaving the scene of an accident contained different elements from the offenses established by the drunk-driving statute. *Buckner v. State*, — So. 3d —, 2013 Miss. App. LEXIS 682 (Miss. Ct. App. Oct. 15, 2013).

### 14. Miscellaneous.

County court did not apply an improper standard of law when convicting defendant of common-law driving under the influence because its determination of defendant's guilt was well-founded both on the law and the evidence. *Huhn v. City of*

Brandon, 121 So. 3d 947 (Miss. Ct. App. 2013).

# § 63-11-41. Admissibility in criminal prosecution of evidence of refusal to submit to chemical test.

## JUDICIAL DECISIONS

### 1. In general.

Evidence was sufficient to support defendant's driving under the influence conviction where two police officers smelled alcohol emitting from defendant's vehicle, defendant exhibited physical signs of impairment during field sobriety tests, and

defendant refused to submit to an Intoxilyzer test, which was admissible pursuant to Miss. Code Ann. § 63-11-41. *Lobo v. City of Ridgeland*, — So. 3d —, 2013 Miss. App. LEXIS 300 (Miss. Ct. App. May 28, 2013).

## CHAPTER 21

### Motor Vehicle Titles

Article 2.	Procedures for Forfeiture of Vehicles Seized in Motor Vehicle Scrapping or Dismantling Violations .....	63-21-101
------------	---	-----------

#### ARTICLE 1.

#### GENERAL PROVISIONS.

# § 63-21-5. Definitions.

## JUDICIAL DECISIONS

### 1. In general.

Creditor, a vehicle dealer, exercised control over debtor's vehicle in violation of the automatic stay by refusing to furnish him with an application for a new certificate of title as required by Mississippi Motor Vehicle and Manufactured Housing Title Law, even though debtor's counsel made him aware of the bankruptcy filing and

automatic stay. Creditor's passive act of holding on to the existing certificate of title prevented debtor from lawfully driving the vehicle, which had the same effect as if creditor had repossessed the vehicle pre-petition and refused to return it post-petition. *Parker v. Smith (In re Parker)*, — Bankr. —, 2014 Bankr. LEXIS 58 (Bankr. S.D. Miss. Jan. 6, 2014).

# § 63-21-9. Requirement of certificate of title.

## JUDICIAL DECISIONS

### 1. In general.

Creditor, a vehicle dealer, exercised control over debtor's vehicle in violation of the automatic stay by refusing to furnish him with an application for a new certificate of title as required by Mississippi Motor Vehicle and Manufactured Housing Title

Law, even though debtor's counsel made him aware of the bankruptcy filing and automatic stay. Creditor's passive act of holding on to the existing certificate of title prevented debtor from lawfully driving the vehicle, which had the same effect as if creditor had repossessed the vehicle

pre-petition and refused to return it post-petition. Parker v. Smith (In re Parker), — Bankr. —, 2014 Bankr. LEXIS 58 (Bankr. S.D. Miss. Jan. 6, 2014).

**§ 63-21-69. Application for and issuance of certificate of title and privilege license upon acquisition of vehicle.**

**JUDICIAL DECISIONS**

**1. Withholding certificate of title.**

Creditor, a vehicle dealer, exercised control over debtor's vehicle in violation of the automatic stay by refusing to furnish him with an application for a new certificate of title as required by Mississippi Motor Vehicle and Manufactured Housing Title Law, even though debtor's counsel made him aware of the bankruptcy filing and

automatic stay. Creditor's passive act of holding on to the existing certificate of title prevented debtor from lawfully driving the vehicle, which had the same effect as if creditor had repossessed the vehicle pre-petition and refused to return it post-petition. Parker v. Smith (In re Parker), — Bankr. —, 2014 Bankr. LEXIS 58 (Bankr. S.D. Miss. Jan. 6, 2014).

**ARTICLE 2.**

**PROCEDURES FOR FORFEITURE OF VEHICLES SEIZED IN MOTOR VEHICLE SCRAPPING OR DISMANTLING VIOLATIONS.**

SEC.  
63-21-103. Vehicles subject to seizure; notice of intent to forfeit seized vehicle; petition to contest forfeiture.

**§ 63-21-103. Vehicles subject to seizure; notice of intent to forfeit seized vehicle; petition to contest forfeiture.**

(1) When any vehicle, trailer or similar conveyance is used in the commission of a violation of Section 63-21-39, the vehicle, trailer or similar conveyance so used is subject to seizure by the applicable law enforcement agency and the vehicle, trailer or similar conveyance may be forfeited by the administrative forfeiture procedures provided for in Sections 63-21-101 through 63-21-107.

(2) The attorney for or any representative of the seizing law enforcement agency shall provide notice of intention to forfeit the seized vehicle, trailer or similar conveyance administratively, either by certified mail, return receipt requested, or by personal delivery, to all persons who are required to be notified pursuant to this section.

(3) In the event that notice of intention to forfeit the seized vehicle, trailer or similar conveyance administratively cannot be given as provided in subsection (2) of this section because of refusal, failure to claim, insufficient address or any other reason, the attorney for or representative of the seizing law enforcement agency shall provide notice by publication in a newspaper of general circulation in the county in which the seizure occurred for once a week for three (3) consecutive weeks.

(4) Notice pursuant to subsections (2) and (3) of this section shall include the following information:



- (a) A description of the vehicle, trailer or similar conveyance;
- (b) The approximate value of the vehicle, trailer or similar conveyance;
- (c) The date and place of the seizure;
- (d) The connection between the vehicle, trailer or similar conveyance and the violation of Section 63-21-39;
- (e) The instructions for filing a request for judicial review; and
- (f) A statement that the vehicle, trailer or similar conveyance will be forfeited to the seizing law enforcement agency if a request for judicial review is not timely filed.

(5) Any person claiming an interest in a vehicle, trailer or similar conveyance which is the subject of a notice under this section may, within thirty (30) days after receipt of the notice or of the date of the first publication of the notice, file a petition to contest forfeiture signed by the claimant in the county court, if a county court exists, or otherwise in the circuit court of the county in which the seizure is made or the county in which the criminal prosecution is brought, in order to claim an interest in the vehicle, trailer or similar conveyance. Upon the filing of the petition and the payment of the filing fees, service of the petition shall be made on the attorney for or representative of the seizing law enforcement agency, and the proceedings shall thereafter be governed by the rules of civil procedure.

(6) If no petition to contest forfeiture is timely filed, the attorney for the seizing law enforcement agency shall prepare a written declaration of forfeiture of the subject vehicle, trailer or similar conveyance and the forfeited vehicle, trailer or similar conveyance shall be used, distributed or disposed of in accordance with the provisions of Section 63-21-107.

**SOURCES:** Laws, 2013, ch. 570, § 3, eff from and after July 1, 2013.

**Editor's Note** — This section is being set out to correct an error in an internal reference in subsection (1). The reference to "Section 63-21-69" was changed to "Section 63-21-39."



# **TITLE 65**

## **HIGHWAYS, BRIDGES AND FERRIES**

### **CHAPTER 1**

#### **Transportation Department**

##### **ARTICLE 1.**

##### **IN GENERAL.**

#### **§ 65-1-65. Maintenance.**

##### **JUDICIAL DECISIONS**

#### **2. Immunity.**

Where three drivers appealed the Miss. R. Civ. P. 12(b)(6) dismissal of their claim against the Mississippi Department of Transportation (MDOT) because of discretionary-function immunity under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 65-1-65 required the MDOT to maintain and repair state highways,

and the MDOT was not entitled to discretionary-function immunity for failure to properly maintain and repair highways because that function was ministerial. It was the function, not the act, to which the MTCA granted or denied immunity. *Little v. Miss. DOT*, — So. 3d —, 2013 Miss. LEXIS 551 (Miss. Oct. 17, 2013).

### **CHAPTER 7**

#### **Public Roads and Streets; Private Way**

##### **ARTICLE 3.**

##### **PRIVATE WAY.**

#### **§ 65-7-201. Private way established.**

##### **JUDICIAL DECISIONS**

#### **2. Location of private road.**

Judgment granting a timber company a private road easement over private property was proper because the timber company established that its need for the road to access its landlocked property was more

than mere convenience as the private road would provide the only feasible way to get to a public highway. *May v. Adirondack Timber I, LLC*, — So. 3d —, 2013 Miss. App. LEXIS 433 (Miss. Ct. App. July 16, 2013).





# TITLE 71

## LABOR AND INDUSTRY

### CHAPTER 3

#### Workers' Compensation

#### GENERAL PROVISIONS

#### § 71-3-3. Definitions.

#### JUDICIAL DECISIONS

- 17. Disability.
- 18. Employee, generally.
- 23. Injury, generally.
- 27. —Mental injuries.
- 30. —Proof of injuries.

#### 17. Disability.

Workers' Compensation Commission erred in denying a former employee benefits for a permanent and total disability. The testimony from the employee's vocational specialist indicated that the employee had a 100% loss in the labor market, and the testimony of the opposing vocational expert showed that the employee should, at the very least, have been assess a loss of wage-earning capacity. *Logan v. Klaussner Furniture Corp.*, 127 So. 3d 1138 (Miss. Ct. App. 2013), writ of certiorari denied by 2014 Miss. LEXIS 11 (Miss. Jan. 9, 2014).

#### 18. Employee, generally.

Mississippi Workers' Compensation Commission erred by declaring that a claimant's permanent total disability benefits related back to the date of injury, as he was not "disabled" on that date because he was able to continue to work thereafter. *Eaton Corp. v. Brown*, — So. 3d —, 2013 Miss. App. LEXIS 344 (Miss. Ct. App.

June 11, 2013), writ of certiorari denied by 2014 Miss. LEXIS 80 (Miss. Jan. 30, 2014).

#### 23. Injury, generally.

#### 27. —Mental injuries.

Denial of workers' compensation benefits for an alleged disabling mental disability was appropriate because the employee failed to present any medical evidence establishing a causal connection between her employment and the alleged injury while the employer's expert testified that his evaluation of the employee indicated that the employee did not suffer any work-related injury. *Lacy v. Jackson State Univ.*, 120 So. 3d 1044 (Miss. Ct. App. 2013).

#### 30. —Proof of injuries.

Workers' Compensation Commission properly affirmed the denial of benefits to an employee because the employee did not seek medical treatment for a month after developing knee pain, told a nurse at the hospital that he had injured his knee while running and denied any work-related injury, and the medical testimony was insufficient to establish a work-related injury. *Johnson v. Sysco Food Servs.*, 122 So. 3d 159 (Miss. Ct. App. 2013).

#### § 71-3-7. Liability for payment of compensation.

#### JUDICIAL DECISIONS

- 7. Injury arising out of and during course of employment, generally.
- 15. —Proof of claim.

- 17. — —Benefits denied.
- 38. Injury from assault or other intentional acts.

**7. Injury arising out of and during course of employment, generally.**

**15. —Proof of claim.**

**17. — —Benefits denied.**

Worker's compensation claimant failed to prove that she had suffered a compensable injury because the claimant, although the claimant alleged that the claimant injured the claimant's back when a coworker kicked the claimant in the back at work, failed to prove by a preponderance of the evidence that the claimant suffered a compensable injury as the claimant's testimony was contradicted by the testimony of the person who allegedly kicked the claimant and the medical evidence did not corroborate the claimant's allegation of a traumatic low-back

injury. *Ross v. Jay's Truck Stop*, — So. 3d —, 2013 Miss. App. LEXIS 240 (Miss. Ct. App. May 7, 2013).

**38. Injury from assault or other intentional acts.**

Substantial evidence supported a decision that the claimant acted in such a way as to intentionally injure himself, thus disqualifying himself from benefits, as it showed that the claimant had one hand on the primary electrical line and one on the neutral line at the time of the incident, and given the large distance between the lines, a finding that he intentionally placed his hands on the lines being fully aware of the consequences was warranted. *Smith v. Tippah Elec. Power Ass'n*, — So. 3d —, 2013 Miss. App. LEXIS 298 (Miss. Ct. App. May 28, 2013).

**§ 71-3-9. Exclusiveness of liability.**

**JUDICIAL DECISIONS**

4. Action against compensation carrier.
7. Willful acts of employer or co-employee.
- 8.5. Intentional infliction of emotional distress.

**4. Action against compensation carrier.**

Where an employee asserted an action against a worker's compensation insurer because of the insurer's intentional bad-faith refusal to pay worker's compensation when due, Mississippi law applied because, *inter alia*, an insurer's intentional bad-faith refusal to pay worker's compensation timely is an independent tort committed by the insurer outside of the scope of the worker's employment and it is legally distinct from and independent of any claims arising under the Mississippi Workers' Compensation Act, and Mississippi had the most significant relationship to the intentional tort suit. *Williams v. Liberty Mut. Ins. Co.*, — F.3d —, 2014 U.S. App. LEXIS 1726 (5th Cir. Jan. 28, 2014).

**7. Willful acts of employer or co-employee.**

Plaintiffs' claim that their former employer battered them when it failed to

remediate toxic mold, which they later inhaled, and by spraying the mold with a substance that injured them, was barred by workers' compensation exclusivity because 1) they did not assert that the employer acted with actual intent to batter and injure them; and 2) the employer could not allow the mold to exist with the intent of injuring them while at the same time attempting to destroy the mold. *Bowden v. Young*, 120 So. 3d 971 (Miss. 2013).

**8.5. Intentional infliction of emotional distress.**

Plaintiffs' intentional infliction of emotional distress claim against their former employer was barred by workers' compensation exclusivity, because the employer's initial denial that there was toxic mold in the building did not rise to the level of outrageous and extreme conduct, especially in view of its later actions to remediate the mold. *Bowden v. Young*, 120 So. 3d 971 (Miss. 2013).



## § 71-3-13. Maximum and minimum recovery.

### JUDICIAL DECISIONS

#### 2. Partial disability cases.

Employee's permanent-partial disability compensation period for two injuries that arose from a workplace accident was properly limited to 450 weeks in order to avoid the pyramiding of benefits, as the 450-week award for his body-as-a-whole injury would have still been running when

the 200-week award for his shoulder injury would have started to run. *Tucker v. Bellsouth Telcoms., Inc.*, — So. 3d —, 2013 Miss. App. LEXIS 357 (Miss. Ct. App. June 18, 2013), writ of certiorari denied by 2014 Miss. LEXIS 48 (Miss. Jan. 16, 2014), writ of certiorari denied by 2014 Miss. LEXIS 39 (Miss. Jan. 16, 2014).

## § 71-3-15. Medical services and supplies.

### JUDICIAL DECISIONS

#### 2. Liability for services.

#### 4. —Employer not required to provide.

#### 2. Liability for services.

#### 4. —Employer not required to provide.

Employee was not entitled to certiorari relief because an administrative law judge (ALJ) correctly found that the employee's

treatment by three doctors fell outside the appropriate statutory chain of referral, the record did not support the employee's assertion that the ALJ and the Mississippi Workers' Compensation Commission disregarded the medical testimony of her unauthorized physicians, and the Commission's findings were supported by substantial evidence. *Allegrezza v. Greenville Mfg. Co.*, 122 So. 3d 719 (Miss. 2013).

## § 71-3-17. Compensation for disability.

### JUDICIAL DECISIONS

#### 1. In general.

#### 4. Wage earning capacity, generally.

#### 9. — Particular cases; no loss in earning capacity.

#### 16. Pre-existing disease or infirmity.

#### 19. Maximum medical improvement.

#### 20. Effect of receipt of disability benefits.

#### 1. In general.

Employee was not entitled to any benefits in excess of those already paid by the employer because she did not establish any additional loss of industrial use in excess of her medical ratings, and she was currently employed within her restrictions and earning a higher wage than her pre-injury wage. *Gaston v. Tyson Foods, Inc.*, 122 So. 3d 797 (Miss. Ct. App. 2013).

#### 4. Wage earning capacity, generally.

Finding by the administrative judge of permanent partial disability and loss of

wage-earning capacity of 25 percent for the claimant's 1996 back injury was supported by the evidence as this injury did not render the claimant permanently and totally disabled. Instead, the claimant continued to work for the employer for over ten years after suffering the injury. *Flowers v. Crown Cork & Seal United States*, — So. 3d —, 2013 Miss. App. LEXIS 388 (Miss. Ct. App. June 25, 2013).

#### 9. — Particular cases; no loss in earning capacity.

Decision that an injured employee was not due additional temporary disability benefits was supported by substantial evidence because she was offered a job by the city within her lifting restrictions, her salary was equal to her prior salary, the employee ultimately failed to return to work, and her attempts to find employment were unsuccessful. *Herbert v. City of*

Horn Lake, — So. 3d —, 2013 Miss. App. LEXIS 643 (Miss. Ct. App. Oct. 1, 2013).

Mississippi Workers' Compensation Commission erred by declaring that a claimant's permanent total disability benefits related back to the date of injury, as he was not "disabled" on that date because he was able to continue to work thereafter. *Eaton Corp. v. Brown*, — So. 3d —, 2013 Miss. App. LEXIS 344 (Miss. Ct. App. June 11, 2013), writ of certiorari denied by 2014 Miss. LEXIS 80 (Miss. Jan. 30, 2014).

#### **16. Pre-existing disease or infirmity.**

Administrative judge's finding that the claimant's 2007 foot injury was work-related was supported by substantial evidence showing that the prolonged standing required by the claimant's job aggravated the claimant's foot condition. *Flowers v. Crown Cork & Seal United States*, — So. 3d —, 2013 Miss. App. LEXIS 388 (Miss. Ct. App. June 25, 2013).

#### **19. Maximum medical improvement.**

Mississippi Workers' Compensation Commission erred in terminating the award of temporary total disability benefits for the claimant's foot condition as there was no finding by either podiatrist or the Commission that the claimant had

reached maximum medical improvement for his injury. *Flowers v. Crown Cork & Seal United States*, — So. 3d —, 2013 Miss. App. LEXIS 388 (Miss. Ct. App. June 25, 2013).

Mississippi Workers' Compensation Commission erroneously denied permanent disability benefits for the claimant's 2007 foot injury as consideration of such benefits was premature given that the record showed that the claimant had not reached maximum medical improvement when he attempted to return to work. *Flowers v. Crown Cork & Seal United States*, — So. 3d —, 2013 Miss. App. LEXIS 388 (Miss. Ct. App. June 25, 2013).

#### **20. Effect of receipt of disability benefits.**

Although a claimant received short-term disability benefits, he was not equitably estopped from receiving workers' compensation benefits for his 2007 foot injury as the employer had not provided the court with any authority that the payment of short-term disability benefits required the denial of workers' compensation benefits. *Flowers v. Crown Cork & Seal United States*, — So. 3d —, 2013 Miss. App. LEXIS 388 (Miss. Ct. App. June 25, 2013).

### **§ 71-3-35. Limitation.**

#### **JUDICIAL DECISIONS**

2. When period commences.
4. Statutory bar, generally.
10. Estoppel.

#### **2. When period commences.**

Workers' compensation claim was time-barred because there was substantial evidence to support the Mississippi Workers' Compensation Commission's finding that the statute of limitations began to run when an orthopedic surgeon, on referral from the claimants' primary-care physician, diagnosed the claimant with carpal tunnel syndrome as the claimant's injury then became reasonably apparent and was more clearly found to be work related. *Brown v. Ill. Tool Works, Inc.*, — So. 3d —, 2013 Miss. App. LEXIS 486 (Miss. Ct. App. Aug. 13, 2013).

#### **4. Statutory bar, generally.**

Substantial evidence supported the Commission's finding that an employee's claim was barred by the two-year statute of limitations contained in the Worker's Compensation Act, Miss. Code Ann. § 71-3-35(1) and that the employee's salary failed to constitute wages in lieu of compensation; because nothing in the record showed that the employee's physicians restricted him from working, and the employer insisted that it did not pay the employee his wages in recognition of a compensable disability, but rather in return for work he performed. *Ladner v. Zachry Constr. & Zurich Am. Ins. Co.*, — So. 2d —, 2013 Miss. App. LEXIS 257 (Miss. Ct. App. May 14, 2013), reversed by,

remanded by 2014 Miss. LEXIS 66 (Miss. Jan. 30, 2014).

Firefighter's claim for workers' compensation benefits was not barred by the two-year statute of limitations period because he was not reasonably aware of the compensable nature of his latent asbestos-related respiratory disease at any time prior to the year he in which he filed his claim. *City of Jackson v. Sandifer*, 125 So. 3d 681 (Miss. Ct. App. 2013).

#### 10. Estoppel.

Employer and an insurance carrier did not waive the statute of limitations be-

cause of their failure immediately to pursue a hearing on the defense and their substantial participation in discovery and litigation for three years, nor did the doctrine of equitable estoppel apply to the case because the claimant was never misled by the employer about workers' compensation benefits *Brown v. Ill. Tool Works, Inc.*, — So. 3d —, 2013 Miss. App. LEXIS 486 (Miss. Ct. App. Aug. 13, 2013).

### § 71-3-37. Payment of compensation.

#### JUDICIAL DECISIONS

##### 1. In general.

Where an employee asserted an action against a worker's compensation insurer because of the insurer's intentional bad-faith refusal to pay worker's compensation when due, Mississippi law applied because, inter alia, an insurer's intentional bad-faith refusal to pay worker's compensation timely is an independent tort committed by the insurer outside of

the scope of the worker's employment and it is legally distinct from and independent of any claims arising under the Mississippi Workers' Compensation Act, and Mississippi had the most significant relationship to the intentional tort suit. *Williams v. Liberty Mut. Ins. Co.*, — F.3d —, 2014 U.S. App. LEXIS 1726 (5th Cir. Jan. 28, 2014).

### § 71-3-47. Determination for claims for compensation.

#### JUDICIAL DECISIONS

##### 1. In general.

##### 11. Timeliness of petition.

##### 1. In general.

There was substantial evidence to support the decision of the Mississippi Workers' Compensation Commission to affirm the administrative law judge's (AJ) decision to deny an employee disability benefits because the AJ, acting under the authority of the Commission, was entitled to rely on his personal experience in making reasonable inferences and in his determination to deny benefits. *Sterling v.*

*Eaton Corp.*, 109 So. 3d 1096 (Miss. Ct. App. 2013).

##### 11. Timeliness of petition.

Case presented a set of unique facts under which the claimant's notice of appeal should be considered timely as the claimant's counsel withdrew on last day that she could have filed her notice of appeal, and the administrative judge clearly determined that fairness required an extension of time for the claimant to prosecute her claim. *Felter v. Floorserv, Inc.*, — So. 3d —, 2013 Miss. LEXIS 293 (Miss. May 16, 2013).



§ 71-3-53. Continuing jurisdiction of the commission.

JUDICIAL DECISIONS

2. Redetermination after review.

Mississippi Worker's Compensation Commission did not err in failing to re-open a claim because there was no merit to the claimant's assertion that there was a mistake in a determination of fact re-

garding the Commission not having the claimant's address or the claimant failing to pursue the claim for workers' compensation benefits. *Rea v. Foamex*, — So. 3d —, 2013 Miss. App. LEXIS 523 (Miss. Ct. App. Aug. 27, 2013).

§ 71-3-71. Compensation for injuries where third parties are liable.

JUDICIAL DECISIONS

3. Parties to action.

With respect to an employer's or workers' compensation insurer's right to subrogation, Miss. Code Ann. § 71-3-71 allows them to either join or intervene in a third party action filed by an injured worker, and either will suffice to protect the insurer's or employer's right to reimbursement. *Liberty Mut. Ins. Co. v. Shoemake*, 111 So. 3d 1207 (Miss. 2013).

Workers' compensation insurer could not file a separate subrogation action un-

der Miss. Code Ann. § 71-3-71 against an injured worker after he settled a third-party action in Alabama and reimbursed the insurer only the amount it was entitled to under Alabama law, as the insurer had notice of the action but did not join or intervene in that suit. *Liberty Mut. Ins. Co. v. Shoemake*, 111 So. 3d 1207 (Miss. 2013).

§ 71-3-93. Administrative staff.

JUDICIAL DECISIONS

1. In general.

There was substantial evidence to support the decision of the Mississippi Workers' Compensation Commission to affirm the administrative law judge's (AJ) decision to deny an employee disability benefits because the AJ, acting under the

authority of the Commission, was entitled to rely on his personal experience in making reasonable inferences and in his determination to deny benefits. *Sterling v. Eaton Corp.*, 109 So. 3d 1096 (Miss. Ct. App. 2013).

## CHAPTER 5

## Unemployment Compensation

## ARTICLE 11.

## BENEFITS.

**§ 71-5-513. Disqualifications [Repealed effective July 1, 2019].**

## JUDICIAL DECISIONS

- 5. Leaving employment without good cause.
- 7. Misconduct discharge, generally.
- 8. — Held disqualification.

**5. Leaving employment without good cause.**

Substantial evidence supported the Mississippi Department of Employment Security Board of Review's denial of unemployment benefits to a staffing company's employee because the employee left an assignment to pursue another job opportunity that would allow him a better chance at permanent, full-time employment, he offered no argument of good cause on appeal, and no evidence of good cause appeared in the record. *Thompson v. Miss. Dep't of Empl. Sec.*, — So. 3d —, 2014 Miss. App. LEXIS 18 (Miss. Ct. App. Jan. 14, 2014).

**7. Misconduct discharge, generally.**

Employee was improperly denied unemployment benefits because her conduct did not amount to insubordination, her actions did not violate the employee handbook, her single incident of disrespectful behavior was not misconduct where there was no constant and continual direct order to do anything, and she was never warned that she would be fired. *Gammage*

*v. Miss. Dep't of Empl. Sec.*, 113 So. 3d 1294 (Miss. Ct. App. 2013).

**8. — Held disqualification.**

Claimant was ineligible to receive unemployment benefits because she was aware of her employer's attendance policy; her excessive tardies were properly documented, and she was given the warnings required under the policy; and the violation of the employer's attendance policy constituted misconduct. *Gibson v. Miss. Dep't of Empl. Sec.*, — So. 3d —, 2014 Miss. App. LEXIS 33 (Miss. Ct. App. Jan. 21, 2014).

Substantial evidence showed that a former employee committed misconduct sufficient to warrant a reversal of an award of unemployment benefits because the owner of the employee's former employer and the employee's former sales manager testified, contrary to the employee's testimony, that the employee refused to retake a State of Mississippi mandatory licensing exam after the employee had failed a previous exam and that the employee continued to improperly complete paperwork and sales contracts after being warned to correct the employee's errors. *Hunter v. Miss. Dep't of Empl. Sec.*, 120 So. 3d 435 (Miss. Ct. App. 2013).

§ 71-5-517. Initial determination [Repealed effective July 1, 2019].

JUDICIAL DECISIONS

2. Late notice of appeal.
3. —Failure to show good cause.

—, 2013 Miss. App. LEXIS 724 (Miss. Ct. App. Oct. 29, 2013).

**2. Late notice of appeal.**

Former employer waived the issue of the untimeliness of a claimant's appeal from the initial determination because the employer did not raise the issue at the hearing before the administrative law judge, or in its appeal to the board of review, but, instead, the issue was first raised on appeal before the circuit court. Moreover, the administrative law judge's determination that the appeal was to be heard on the merits was not an abuse of discretion. *Woodland Vill. Nursing Ctr., LLC v. Miss. Dep't of Empl. Sec.*, — So. 3d

**3. —Failure to show good cause.**

Employee was not entitled to unemployment benefits because her appeal was not timely filed, and the record did not present any set of facts that would support a showing of good cause to excuse her untimely filing where, when asked why she did not file the appeal in a timely manner, the employee simply stated that she had other things going on and that she thought her claim would be denied anyway. *Jackson v. Miss. Dep't of Empl. Sec.*, 121 So. 3d 298 (Miss. Ct. App. 2013).



# **TITLE 73**

## **PROFESSIONS AND VOCATIONS**

### **CHAPTER 35**

#### **Real Estate Brokers**

#### **IN GENERAL**

#### **§ 73-35-3. Definitions; applicability of chapter.**

#### **JUDICIAL DECISIONS**

##### **2. Jurisdiction.**

Mississippi Real Estate Commission had jurisdiction to suspend two real estate brokers' licenses because the affiliate broker held himself out to be a real estate

broker in a transaction and the other broker, as the responsible broker, was liable. *Gussio v. Miss. Real Estate Comm'n*, 122 So. 3d 783 (Miss. Ct. App. 2013).

#### **§ 73-35-21. Grounds for refusing to issue or suspending or revoking license; hearing.**

#### **JUDICIAL DECISIONS**

##### **3. Misrepresentations.**

Suspension by the Mississippi Real Estate Commission of real estate brokers' licenses for two brokers, an affiliate broker and a responsible broker, was appropriate because the brokers engaged in prohibited conduct in connection with a

real estate transaction as substantial evidence existed to show that the affiliate broker misrepresented to a buyer that a contract for the purchase of a home had been formed. *Gussio v. Miss. Real Estate Comm'n*, 122 So. 3d 783 (Miss. Ct. App. 2013).



# **TITLE 75**

## **REGULATION OF TRADE, COMMERCE AND INVESTMENTS**

### **CHAPTER 2**

#### **Uniform Commercial Code — Sales**

##### **PART 2.**

###### **FORM, FORMATION AND READJUSTMENT OF CONTRACT.**

###### **§ 75-2-201. Formal requirements; statute of frauds.**

###### **JUDICIAL DECISIONS**

###### **C. Writing.**

###### **15. In general; necessity.**

###### **C. Writing.**

###### **15. In general; necessity.**

Chapter 13 debtor's claim that he had an oral agreement with a creditor to sell the creditor a company he owned that manufactured and sold bird calls, in ex-

change for payment of \$250,000 in five \$50,000 increments over five years and the creditor's promise to forgive debts the debtor owed under several promissory notes he signed, was barred by two Mississippi statutes of frauds: Miss. Code Ann. §§ 15-3-1 and 75-2-201. *Ziegler v. Hood* (In re Hood), — Bankr. —, 2013 Bankr. LEXIS 3709 (Bankr. N.D. Miss. Sept. 3, 2013).

##### **PART 6.**

###### **BREACH, REPUDIATION AND EXCUSE.**

###### **§ 75-2-613. Casualty to identified goods.**

###### **JUDICIAL DECISIONS**

###### **1. In general.**

Buyer's claim for U.C.C. damages either actual, incidental, and/or consequential to the breach of a sales contract was properly dismissed because the sales contract was voided due to a mutual mistake of fact regarding the identity of the horse which

the buyer purchased. The law allowed the buyer to be put back in the same place the buyer was before the contract was formed based on the mutual mistake of fact. *Lane-Lott v. White*, 126 So. 3d 1016 (Miss. Ct. App. 2013).



## CHAPTER 3

### Uniform Commercial Code — Negotiable Instruments

#### PART 1.

#### GENERAL PROVISIONS AND DEFINITIONS.

### § 75-3-102. Subject matter.

#### JUDICIAL DECISIONS

##### I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

##### 1. Applicability.

##### I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

##### 1. Applicability.

Because four CDs were non-negotiable, they were not instruments governed by

Article 3 of Mississippi's Uniform Commercial Code, Miss. Code Ann. § 75-3-101 et seq. *Ravenstein v. Cmty. Trust Bank*, — So. 2d —, 2013 Miss. App. LEXIS 476 (Miss. Ct. App. Aug. 6, 2013).

## CHAPTER 4

### Uniform Commercial Code—Bank Deposits and Collections

#### PART 1.

#### GENERAL PROVISIONS AND DEFINITIONS.

### § 75-4-103. Variation by agreement; measure of damages; action constituting ordinary care.

#### JUDICIAL DECISIONS

##### 2. Permissible variations.

Customer's suit against a bank arising out of checks forged by the customer's bookkeeper failed because it did not report the forgeries within 60 days, as required by its deposit agreement, and Miss. Code

Ann. § 75-4-406(f)'s one-year notice provision for unauthorized signatures could be varied by the deposit agreement. *Century Constr. Co., LLC v. BancorpSouth Bank*, 117 So. 3d 345 (Miss. Ct. App. 2013).

PART 4.

RELATIONSHIP BETWEEN PAYOR BANK AND ITS CUSTOMER.

**§ 75-4-406. Customer's duty to discover and report unauthorized signature or alteration.**

**JUDICIAL DECISIONS**

**A. Decisions Under Uniform Commercial Code.**

4. Notice.
5. —Notice; timeliness.

**A. Decisions Under Uniform Commercial Code.**

**4. Notice.**

Customer's report to a bank of unauthorized signatures or alterations of checks should be sufficient to at least identify the quantity of checks involved, their amounts, the dates and check numbers, the names of the payees, or any other specific information upon which the bank could have acted. *Century Constr. Co., LLC v. BancorpSouth Bank*, 117 So. 3d 345 (Miss. Ct. App. 2013).

Though a customer notified the bank about forgeries on its account, it did not give the required statutory notice until it sent the bank a ledger listing the checks the bank paid that had been forged. *Century Constr. Co., LLC v. BancorpSouth Bank*, 117 So. 3d 345 (Miss. Ct. App. 2013).

**5. —Notice; timeliness.**

Customer's suit against a bank arising out of checks forged by the customer's bookkeeper failed because it did not report the forgeries within 60 days, as required by its deposit agreement, and under Miss. Code Ann. § 75-4-103(a), the statutory one-year notice provision for unauthorized signatures could be varied by the deposit agreement. *Century Constr. Co., LLC v. BancorpSouth Bank*, 117 So. 3d 345 (Miss. Ct. App. 2013).

**CHAPTER 17**

**Interest, Finance Charges, and Other Charges**

**GENERAL PROVISIONS**

**§ 75-17-1. Legal rates of interest and finance charges.**

**JUDICIAL DECISIONS**

**I. In General.**

3. Recovery of interest in particular cases—Delinquent taxes.
4. —Amounts due to laborers, materialmen, or contractors.

**I. In General.**

3. Recovery of interest in particular cases—Delinquent taxes.
4. —Amounts due to laborers, materialmen, or contractors.

Where appellee's recovery was based on

an oral contract, he was not entitled to prejudgment interest because there was a bona fide dispute as to the amount of damages, and prejudgment interest was unavailable under Miss. Code Ann. §§ 75-17-1 or 87-7-3 where the damages were unliquidated. *Falkner v. Stubbs*, 121 So. 3d 899 (Miss. 2013).

CHAPTER 71

Mississippi Securities Act of 2009

ARTICLE 5.

FRAUD AND LIABILITIES.

§ 75-71-501. General fraud.

JUDICIAL DECISIONS

II. Under former § 75-71-501.

Chancellor properly affirmed a final order finding that a corporation's officers violated the provisions of the former Mississippi Securities Act (repealed effective January 1, 2010; similar provisions may be found in the Mississippi Securities Act of 2009, effective January 1, 2010) because they did not comply with the terms of the private placement memorandum by

placing investment funds in an escrow account and by maintaining adequate records of the corporation's financial operating activities; however, there was no basis in the law for the method of calculating the penalties by multiplying the number of violations by the number of investors. *Harrington v. Office of the Miss. Secy. of State*, — So. 3d —, 2013 Miss. LEXIS 590 (Miss. Nov. 21, 2013).



# **TITLE 77**

## **PUBLIC UTILITIES AND CARRIERS**

### **CHAPTER 3**

#### **Regulation of Public Utilities**

#### **ARTICLE 17.**

#### **CALLER ID ANTI-SPOOFING ACT.**

#### **§ 77-3-801. Short title.**

#### **JUDICIAL DECISIONS**

1-2. [Reserved for future use.]

3. Preemption by federal law.

#### **1-2. [Reserved for future use.]**

#### **3. Preemption by federal law.**

In light of 47 USCS § 227(e)(1)'s carefully-drafted language and legislative history, and in spite of presumption against preemption that attaches to State's exercise of its police power, there is inherent federal objective in Truth in Caller ID Act of 2009 to protect non-harmful spoofing; Mississippi Caller ID Anti-Spoofing Act's proscription of non-harmful spoofing

(spoofing done without intent to defraud, cause harm, or wrongfully obtain anything of value) frustrates this federal objective and is, therefore, conflict-preempted. *Teltech Sys. v Bryant*, 702 F3d 232 (5th Cir. 2012).

Because court held that Mississippi Caller ID Anti-Spoofing Act was conflict-preempted by Truth in Caller ID Act of 2009, court did not need to consider its validity under dormant Commerce Clause or First Amendment. *Teltech Sys. v Bryant*, 702 F3d 232 (5th Cir. 2012).

## CHAPTER 9

### Railroads and Other Common Carriers

#### ARTICLE 3.

#### RAILROADS AND RAILROAD CORPORATIONS.

#### SAFETY

### § 77-9-225. Locomotives to give warning when approaching crossings; penalty.

#### JUDICIAL DECISIONS

##### II. PRACTICE AND PROCEDURE.

##### 7. Evidence.

##### II. PRACTICE AND PROCEDURE.

##### 7. Evidence.

Railroad was properly granted summary judgment dismissing appellants' negligence claims, as the evidence established that the train was traveling below the speed limit, that the crew kept a

proper lookout, that the train's whistle blew 900 feet before the crossing as required by statute, and that the emergency brake was activated before impact, and appellants did not support their claim that the railroad failed to clear vegetation near crossing or to maintain an adequate crossing warning system. *Estate of Bloodworth v. Ill. Cent. R.R. Co.*, — So. 3d —, 2013 Miss. LEXIS 588 (Miss. Nov. 21, 2013).

### § 77-9-254. Removal by railroad companies of vegetation at railroad right-of-way grade crossings; specifications; inspections by Department of Transportation; fines; damages.

#### JUDICIAL DECISIONS

##### 2. Evidence.

##### 3. Summary judgment.

##### 2. Evidence.

Expert's opinion did not support appellants' claim that a train crew's view of a crossing was obstructed by vegetation in violation because his opinion regarding sight-distance deficiencies was based on calculations of a train traveling at 79 mph, while the evidence established that it had been traveling at approximately 49 mph as it approached the crossing. *Estate of Bloodworth v. Ill. Cent. R.R. Co.*, — So. 3d —, 2013 Miss. LEXIS 588 (Miss. Nov. 21, 2013).

##### 3. Summary judgment.

Railroad was properly granted summary judgment dismissing appellants'

negligence claims, as the evidence established that the train was traveling below the speed limit, that the crew kept a proper lookout, that the train's whistle blew 900 feet before the crossing as required by statute, and that the emergency brake was activated before impact, and appellants did not support their claim that the railroad failed to clear vegetation near crossing or to maintain an adequate crossing warning system. *Estate of Bloodworth v. Ill. Cent. R.R. Co.*, — So. 3d —, 2013 Miss. LEXIS 588 (Miss. Nov. 21, 2013).

**TITLE 79**  
**CORPORATIONS, ASSOCIATIONS, AND**  
**PARTNERSHIPS**

**CHAPTER 4**

**Mississippi Business Corporation Act**

**ARTICLE 10.**

**AMENDMENT OF ARTICLES OF INCORPORATION AND BYLAWS.**

**SUBARTICLE A.**

**AMENDMENT OF ARTICLES OF INCORPORATION.**

**§ 79-4-10.09. Effect of amendment.**

**JUDICIAL DECISIONS**

**3. Illustrative cases.**

Arbitrator was the proper arbitrator, and it had jurisdiction, because the arbitrator's name change did not negate the

validity of an arbitration agreement, Wells Fargo Advisors, LLC v. Runnels, 126 So. 3d 137 (Miss. Ct. App. 2013).





## TITLE 81

### BANKS AND FINANCIAL INSTITUTIONS

Chapter 18.	Mississippi S.A.F.E. Mortgage Act .....	81-18-1
-------------	---	---------

#### CHAPTER 18

##### Mississippi S.A.F.E. Mortgage Act

In General .....	81-18-1
------------------	---------

#### IN GENERAL

SEC.	
81-18-21.	Maintenance and investigation of business records; biennial investigation; examination fee; department authorized to examine persons suspected of conducting business requiring a license; licensee to make records and books available to commissioner and compile reports; commissioner may control access to records of licensee under investigation [Repealed effective July 1, 2016].

**§ 81-18-21. Maintenance and investigation of business records; biennial investigation; examination fee; department authorized to examine persons suspected of conducting business requiring a license; licensee to make records and books available to commissioner and compile reports; commissioner may control access to records of licensee under investigation [Repealed effective July 1, 2016].**

(1) Any person required to be licensed under this chapter shall maintain in its offices, or such other location as the department shall permit, the books, accounts and records necessary for the department to determine whether or not the person is complying with the provisions of this chapter and the rules and regulations adopted by the department under this chapter. These books, accounts and records shall be maintained apart and separate from any other business in which the person is involved and may represent historical data for three (3) years preceding the date of the last license application date forward. The books, accounts and records shall be kept in a secure location under conditions that will not lead to their damage or destruction. If the licensee wishes to keep the files in a location other than the location listed on the license, then the licensee first must submit a written request on a form designated by the department and gain written approval from the commissioner before storing the files at an off-site secure location.

(2) To assure compliance with the provisions of this chapter, the department may examine the books and records of any licensee without notice during normal business hours. The commissioner shall charge the licensee an examination fee in an amount not less than Three Hundred Dollars (\$300.00) nor

more than Six Hundred Dollars (\$600.00) per day with a maximum examination fee of Two Thousand Four Hundred Dollars (\$2,400.00) for each office or location within the State of Mississippi, and an examination fee in an amount not less than Three Hundred Dollars (\$300.00) nor more than Eight Hundred Dollars (\$800.00) per day for each office or location outside the State of Mississippi, plus any actual expenses incurred while examining the licensee's records or books that are located outside the State of Mississippi. However, in no event shall a licensee be examined more than once in a two-year period unless for cause shown based upon consumer complaint and/or other exigent reasons as determined by the commissioner.

(3) The department, its designated officers and employees, or its duly authorized representatives, for the purposes of discovering violations of this chapter and for the purpose of determining whether any person or individual reasonably suspected by the commissioner of conducting business that requires a license under this chapter, may investigate those persons and individuals and examine all relevant books, records and papers employed by those persons or individuals in the transaction of business, and may summon witnesses and examine them under oath concerning matters as to the business of those persons, or other such matters as may be relevant to the discovery of violations of this chapter, including, without limitation, the conduct of business without a license as required under this chapter.

(4) Each licensee, individual or person subject to this chapter shall make available to the commissioner upon request the books and records relating to the operations of the licensee, individual or person subject to this chapter. The commissioner shall have access to those books and records and interview the officers, principals, mortgage loan originators, employees, independent contractors, agents, and customers of the licensee, individual or person subject to this chapter concerning their business.

(5) Each licensee, individual or person subject to this chapter shall make or compile reports or prepare other information as directed by the commissioner in order to carry out the purposes of this section, including, but not limited to:

- (a) Accounting compilations;
- (b) Information lists and data concerning loan transactions in a format prescribed by the commissioner; or
- (c) Such other information deemed necessary to carry out the purposes of this section.

(6) In making any examination or investigation authorized by this chapter, the commissioner may control access to any documents and records of the licensee or person under examination or investigation. The commissioner may take possession of the documents and records or place a person in exclusive charge of the documents and records in the place where they are usually kept. During the period of control, no individual or person shall remove or attempt to remove any of the documents and records except under a court order or with the consent of the commissioner. Unless the commissioner has reasonable grounds to believe the documents or records of the licensee have been or are at



risk of being altered or destroyed for purposes of concealing a violation of this chapter, the licensee or owner of the documents and records shall have access to the documents or records as necessary to conduct its ordinary business affairs.

(7) The commissioner shall report regularly violations of this chapter, as well as enforcement actions and other relevant information, to the Nationwide Mortgage Licensing System and Registry subject to the provisions contained in Section 81-18-63.

(8) Examinations and investigations conducted under this chapter and information obtained by the department, except as provided in subsection (7) of this section, in the course of its duties under this chapter are confidential.

(9) In the absence of malice, fraud or bad faith a person is not subject to civil liability arising from the filing of a complaint with the department, furnishing other information required by this chapter, information required by the department under the authority granted in this chapter, or information voluntarily given to the department related to allegations that a licensee or prospective licensee has violated this chapter.

(10) In order to carry out the purposes of this section, the commissioner may:

(a) Accept and rely on examination or investigation reports made by other government officials, within or without this state; or

(b) Accept audit reports made by an independent certified public accountant for the licensee, individual or person subject to this chapter in the course of that part of the examination covering the same general subject matter as the audit and may incorporate the audit report in the report of the examination, report of investigation or other writing of the commissioner.

(11) The authority of this section shall remain in effect, whether such a licensee, individual or person subject to this chapter acts or claims to act under any licensing or registration law of this state, or claims to act without that authority.

(12) No licensee, individual or person subject to investigation or examination under this section may knowingly withhold, abstract, remove, mutilate, destroy or secrete any books, records, computer records or other information.

**SOURCES:** Laws, 2000, ch. 579, § 11; reenacted and amended, Laws, 2002, ch. 500, § 12; reenacted and amended, Laws, 2004, ch. 364, § 12; reenacted and amended, Laws, 2007, ch. 581, § 12; Laws, 2009, ch. 544, § 12; reenacted without change, Laws, 2010, ch. 462, § 13; reenacted without change, Laws, 2012, ch. 571, § 12; Laws, 2013, ch. 499, § 6, eff from and after July 1, 2013.

**Editor's Note** — This section was set out to correct an error in the 2013 Cumulative Supplement.



# **TITLE 83**

## **INSURANCE**

### **CHAPTER 2**

#### **Competitive Rating for Property and Casualty Insurance**

#### **§ 83-2-3. Standards applicable to rates; criteria for determining compliance.**

##### **JUDICIAL DECISIONS**

##### **1. Private cause of action.**

Miss. Code Ann. § 83-2-3 was regulatory in nature and afforded no private right of action; the Mississippi Commissioner of Insurance was charged with enforcement of § 83-2-3. Miss. Code Ann. § 83-2-29(1). The defendant correctly stated that the plaintiff confessed the excessive rate standards claim, and the par-

ties agreed that no private cause of action existed under Miss. Code Ann. § 83-2-3; therefore, the court granted summary judgment in favor of the defendant as to the plaintiff's excessive rate standards claim. *Mullen v. Nationwide Mut. Ins. Co.*, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 7679 (S.D. Miss. Jan. 18, 2013).

#### **§ 83-2-29. Penalties; procedures for license suspension.**

##### **JUDICIAL DECISIONS**

##### **1. Enforcement.**

Miss. Code Ann. § 83-2-3 was regulatory in nature and afforded no private right of action; the Mississippi Commissioner of Insurance was charged with enforcement of § 83-2-3. Miss. Code Ann. § 83-2-29(1). The defendant correctly stated that the plaintiff confessed the excessive rate standards claim, and the par-

ties agreed that no private cause of action existed under Miss. Code Ann. § 83-2-3; therefore, the court granted summary judgment in favor of the defendant as to the plaintiff's excessive rate standards claim. *Mullen v. Nationwide Mut. Ins. Co.*, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 7679 (S.D. Miss. Jan. 18, 2013).



## CHAPTER 11

### Automobile Insurance

#### ARTICLE 1.

#### CANCELLATION OR NONRENEWAL OF POLICY.

### § 83-11-7. Non-renewal.

#### JUDICIAL DECISIONS

##### 1. In general.

Failure of an insurer to provide the bank, which loaned money to the insured for the purchase of an automobile, with notice of the insurer's non-renewal of the insured's automobile insurance policy did

not provide the insured with any rights or cause of action regarding the policy coverage. *Alexander v. Aig Agency Auto, Inc.*, — So. 3d —, 2013 Miss. App. LEXIS 865 (Miss. Ct. App. Dec. 10, 2013).

### § 83-11-9. Proof of notice.

#### JUDICIAL DECISIONS

##### 1. In general.

Insurer was entitled to summary judgment on an insured's coverage claim because the certificate of mailing which the insurer provided was conclusive proof of the insured's receipt of notice of the cancellation by the insurer of the insured's

automobile insurance policy, and the insured failed to provide sufficient evidence to create a triable issue of fact to overcome the presumption of notice. *Alexander v. Aig Agency Auto, Inc.*, — So. 3d —, 2013 Miss. App. LEXIS 865 (Miss. Ct. App. Dec. 10, 2013).

#### ARTICLE 3.

#### UNINSURED MOTORIST COVERAGE.

### § 83-11-101. Automobile liability policies to contain "uninsured motorist" and property damage provisions.

#### JUDICIAL DECISIONS

##### 15. Waiver of uninsured motorist coverage.

Fact issues as to whether an insurance agent explained the costs and benefits of uninsured motorist (UM) coverage and whether the insureds gave a knowing and intelligent waiver of UM coverage precluded summary judgment on a UM claim where the insureds testified they did not read the provision before signing a waiver and that the agent did not explain the

waiver to them. *Honeycutt v. Coleman*, 120 So. 3d 358 (Miss. 2013).

Any waiver of uninsured motorist (UM) coverage must be made knowingly, intelligently, and in writing, with the insurer bearing the burden of proof, which may be met by establishing that the insurer provided an explanation, appropriate to the client, of UM coverage or that the client was fully knowledgeable through other sources of the purposes and benefits of

UM coverage; any document signed by the client that states that an explanation was given to the client may be considered, but is not dispositive. Whether a client made a

knowing and intelligent waiver of UM coverage is a question of fact for the factfinder. *Honeycutt v. Coleman*, 120 So. 3d 358 (Miss. 2013).

## CHAPTER 17

### Insurance Agents, Solicitors, or Adjusters

#### ARTICLE 1.

#### GENERAL PROVISIONS.

### § 83-17-1. Agent defined.

#### JUDICIAL DECISIONS

#### 4. Agents' knowledge as imputable to insurer-generally.

Insurer was not aware that there was a lienholder on an insured vehicle because, although knowledge acquired by a soliciting agent in the course of the agent's employment in soliciting insurance and

preparing and transmitting applications was ordinarily imputed to the insurer, the agent never said that the agent was aware that there was a lienholder. *Alexander v. Aig Agency Auto, Inc.* — So. 3d —, 2013 Miss. App. LEXIS 865 (Miss. Ct. App. Dec. 10, 2013).

## CHAPTER 58

### New Home Warranty Act

### § 83-58-17. Statutory remedy for damages arising from violations of home warranty law; common law remedies.

#### JUDICIAL DECISIONS

1.-2. [Reserved for future use.]

3. Builder.

1.-2. [Reserved for future use.]

3. Builder.

It was undisputed that plaintiffs entered into a contract with the building

corporation, not debtor, its sole owner. As a result, plaintiff was not entitled to relief from debtor under the New Home Warranty Act. *Hoffmeister v. Early* (In re Early), — Bankr. —, 2013 Bankr. LEXIS 4128 (Bankr. S.D. Miss. Sept. 30, 2013).





# TITLE 85

## DEBTOR-CREDITOR RELATIONSHIP

### CHAPTER 5

#### Joint and Several Debtors

**§ 85-5-7. Limitation of joint and several liability for damages caused by two or more persons; contribution between joint tortfeasors; determination of percentage of fault; liability of medical defendants for economic and noneconomic damages.**

#### JUDICIAL DECISIONS

##### I. Under § 85-5-7.

- 3. Instructions to jury.
- 3.5. Verdict forms.
- 6. Miscellaneous.

##### I. Under § 85-5-7.

##### 3. Instructions to jury.

Circuit court did not err, pursuant to Miss. Code Ann. §§ 85-5-7(5) and 63-3-805, in refusing an apportionment-of-fault jury instruction because the uncontested evidence presented at trial demonstrated that it was one motorist's negligence that was the sole proximate cause of the accident at an intersection and the injuries sustained by the other motorist and the other motorist's spouse. *Dunnam v. Abney*, — So. 3d —, 2013 Miss. App. LEXIS 770 (Miss. Ct. App. Nov. 12, 2013).

##### 3.5. Verdict forms.

Trial court's failure to use verdict forms proposed by a law firm, which would have permitted an allocation of fault to each party under the comparative fault law, was reversible error in the contractor's action, alleging legal malpractice and related claims, as the evidence would have permitted an allocation of fault to the various parties. *Baker & McKenzie, LLP v. Evans*, 123 So. 3d 387 (Miss. 2013).

##### 6. Miscellaneous.

Chancellor erred by imposing joint and several liability on a city, lake owners, and a homeowners association for damages to a homeowner's property caused by the failure of a culvert system, as she did not find that they had colluded to commit a tortious act. *Borne v. Estate of T. L. Carraway*, 118 So. 3d 571 (Miss. 2013).

## CHAPTER 7

### Liens

#### MECHANICS AND STABLEKEEPERS

**§ 85-7-107. Lien on motor vehicle for labor and materials used in constructing, manufacturing or repairing vehicle; notice to legal owner and holder of any lien; judgment on lien; redemption; sale of vehicle.**

#### JUDICIAL DECISIONS

**2. Construction with other law.**

Defendants were properly convicted of armed robbery (Miss. Code Ann. § 97-3-79) for taking a car from the victim's repair shop at gunpoint; although one

defendant had legal title to the car, the victim had the right of possession of the car through his mechanic's lien under Miss. Code Ann. § 85-7-107. *Veazy v. State*, 113 So. 3d 1226 (Miss. 2013).

#### LABORERS, MATERIALMEN, ARCHITECTS, SURVEYORS, ENGINEERS, WATER WELL DRILLERS AND CONTRACTORS

**§ 85-7-151. Judgment in suits on builder's and contractor's liens; costs and attorney's fees.**

#### JUDICIAL DECISIONS

**1. In general.**

Though appellee filed suit to enforce his contractor's lien, the trial court entered judgment for breach of contract only and made no provision for the sale of appel-

lants' property to satisfy the judgment; therefore, appellee was not entitled to the attorney's fees provided for in an action to enforce a contractor's lien. *Falkner v. Stubbs*, 121 So. 3d 899 (Miss. 2013).

#### LIEN ON AMOUNT DUE CONTRACTOR

**§ 85-7-181. Amount due contractor or master workman may be bound by written notice; suit.**

#### JUDICIAL DECISIONS

**1. In general.**

Mississippi's Stop Notice statute is facially unconstitutional because it deprives a contractor of funds that are bound under the statute without due process of law; the statute authorizes the withholding of

funds for an indefinite period of time and provides for no pre-deprivation notice or hearing of any kind. *Noatex Corp. v. King Constr. of Houston, L.L.C.*, 732 F.3d 479 (5th Cir. 2013).

**§ 85-7-185. Bond; provisions; right to intervene in action on bond.**

**JUDICIAL DECISIONS**

**8. Bid awards.**

That appellant's suppliers were protected by a payment bond did not preclude a school board, which awarded the contract to the next lowest bidder, from con-

sidering appellant's prior payment disputes with suppliers. *Rod Cooke Constr. Co. v. Lamar County Sch. Bd.*, — So. 3d —, 2013 Miss. App. LEXIS 641 (Miss. Ct. App. Oct. 1, 2013).

**TOWING AND STORAGE OF MOTOR VEHICLES**

**§ 85-7-251. Sale of motor vehicle for towing and storage cost; notice requirement.**

**JUDICIAL DECISIONS**

**0.5. In general.**

Because issues regarding the possessory rights of the parties remained unresolved, remand for a new trial on the merits was warranted to determine which party had a superior possessory right, under Miss. Code Ann. §§ 11-37-101 and

85-7-251, to vehicles which a towing company towed from an auto repairman's leased premises at the landlord's direction. *Crowell v. Butts*, — So. 3d —, 2013 Miss. App. LEXIS 866 (Miss. Ct. App. Dec. 10, 2013).





**TITLE 87**  
**CONTRACTS AND CONTRACTUAL RELATIONS**

**CHAPTER 7**

**Improvements to Real Property**

**§ 87-7-3. Payment of contractors; penalty for late payment.**

**JUDICIAL DECISIONS**

**4. Liquidated damages requirement.**

Where appellee's recovery was based on an oral contract, he was not entitled to prejudgment interest because there was a bona fide dispute as to the amount of

damages, and prejudgment interest was unavailable under Miss. Code Ann. §§ 75-17-1 or 87-7-3 where the damages were unliquidated. *Falkner v. Stubbs*, 121 So. 3d 899 (Miss. 2013).





# **TITLE 89**

## **REAL AND PERSONAL PROPERTY**

### **CHAPTER 1**

#### **Land and Conveyances**

##### **IN GENERAL**

#### **§ 89-1-7. Estate in two or more persons.**

##### **JUDICIAL DECISIONS**

#### **4. Tenancy by entirety.**

Chapter 13 debtor who owned real property with her husband as a tenant by the entireties, which she claimed as her homestead, was allowed under 11 U.S.C.S. § 522(b)(3)(B) to exempt the full value of the property from unsecured creditors' claims for debts she incurred separately, when her husband did not join

her in filing bankruptcy. Mississippi was a common law state, the common law of Mississippi constituted "applicable nonbankruptcy law" under § 522(b)(3)(B), and her homestead was exempt under Mississippi law from any process which could arise from the claims at issue. In re Dixon, — Bankr. —, 2011 Bankr. LEXIS 5680 (Bankr. S.D. Miss. Mar. 31, 2011).

### **CHAPTER 5**

#### **Recording of Instruments**

##### **ARTICLE 1.**

##### **GENERAL PROVISIONS.**

#### **§ 89-5-3. Conveyances, mortgages; void if not lodged for record.**

##### **JUDICIAL DECISIONS**

3. Record of void instrument.
5. Miscellaneous.

#### **3. Record of void instrument.**

Warranty deed which was filed in the wrong judicial district was void as to a utility because the utility acquired its interest to the subject real property in a quick-take condemnation action without notice of the misfiled deed. Harrison County Util. Auth. v. Walker, — So. 3d —, 2014 Miss. App. LEXIS 19 (Miss. Ct. App. Jan. 14, 2014).

#### **5. Miscellaneous.**

If a landowner's spouse and adult child claimed an interest in a property which a utility sought to acquire in a quick-take condemnation action, their claim was against the landowner only because a warranty deed purporting to convey an interest in the subject property was misfiled in the wrong judicial district. Harrison County Util. Auth. v. Walker, — So. 3d —, 2014 Miss. App. LEXIS 19 (Miss. Ct. App. Jan. 14, 2014).

**§ 89-5-13. Instruments of conveyance recorded for seven and ten years; acknowledgment valid.**

**JUDICIAL DECISIONS**

**1. In general.**

Chancery court erred in relying on Miss. Code Ann. § 89-5-13 to find that two deeds were effective on the dates reflected in the acknowledgments, without addressing uncontradicted testimony re-

garding the intent of the parties or considering when the deeds were delivered and accepted. *Morrow v. Morrow*, — So. 3d —, 2013 Miss. LEXIS 546 (Miss. Oct. 17, 2013).

**CHAPTER 7**

**Landlord and Tenant**

**§ 89-7-51. Lien of landlord.**

**JUDICIAL DECISIONS**

**12. Miscellaneous.**

Render of judgment in favor of a tenant on the tenant's unlawful-reentry issue was appropriate because the evidence showed that the landlord acted without authority in using self-help to reenter the

leased property, as the lease did not provide for such action, and failed to provide the tenant with a notice and hearing before reentering the property. *Crowell v. Butts*, — So. 3d —, 2013 Miss. App. LEXIS 866 (Miss. Ct. App. Dec. 10, 2013).

**§ 89-7-55. Attachment for rent and supplies; who entitled to and for what.**

**JUDICIAL DECISIONS**

**1. In general.**

Render of judgment in favor of a tenant on the tenant's unlawful-reentry issue was appropriate because the evidence showed that the landlord acted without authority in using self-help to reenter the

leased property, as the lease did not provide for such action, and failed to provide the tenant with a notice and hearing before reentering the property. *Crowell v. Butts*, — So. 3d —, 2013 Miss. App. LEXIS 866 (Miss. Ct. App. Dec. 10, 2013).

# TITLE 91

## TRUSTS AND ESTATES

### CHAPTER 5

#### Wills and Testaments

#### § 91-5-1. Who may execute; signature; attestation.

#### JUDICIAL DECISIONS

- 8. Testamentary capacity.
- 11. —Undue influence.
- 12. Execution, in general.

#### 8. Testamentary capacity.

##### 11. —Undue influence.

In a will contest amongst siblings, the proponent and beneficiary was unable to overcome the presumption of undue influence because, inter alia, the beneficiary was substantially involved in the procurement of the will and paid the costs of the will's execution, and the testator, who was the siblings' mother, was not aware of her total assets and their worth, was totally

dependent on the beneficiary to handle her finances, and did not seek advice from a person disconnected to the beneficiary. *Thomas v. Thomas*, 122 So. 3d 111 (Miss. Ct. App. 2013).

##### 12. Execution, in general.

Although a testator did not affix her initials in the margins of the first two pages of her four-page will, the will was validly executed because there was evidence the testator actually signed the will in the presence of two attesting witnesses. *Thomas v. Thomas*, 122 So. 3d 111 (Miss. Ct. App. 2013).

### CHAPTER 7

#### Executors and Administrators

#### § 91-7-25. Necessary parties to contest.

#### JUDICIAL DECISIONS

#### 2. Standing.

Appellant was properly ordered to pay an estate's attorneys' fees under Miss. R. Civ. P. 11, as appellant's arguments on the issue of his standing to contest the will were frivolous, his filings contained misrepresented facts, and the estate was forced to incur unnecessary attorney's fees in responding to those filings. *Covington v. McDaniel* (In re Estate of Necaise), 126 So. 3d 49 (Miss. Ct. App. 2013), writ of certiorari denied by 125 So. 3d 658, 2013 Miss. LEXIS 598 (Miss. 2013), writ of certiorari denied by 125 So. 3d 658, 2013 Miss. LEXIS 601 (Miss. 2013), writ of certiorari denied by 125 So. 3d 658, 2013 Miss. LEXIS 610 (Miss. 2013).

As appellant failed to obtain a judgment, or status as a creditor of the estate, because the statute of limitations had expired and the action was not properly served upon the estate or the decedent during his lifetime, appellant did not have a direct pecuniary interest against the estate and thus was not an interested party under Miss. Code Ann. § 91-7-25; therefore, he was not a proper party to the will contest. *Covington v. McDaniel* (In re Estate of Necaise), 126 So. 3d 49 (Miss. Ct. App. 2013), writ of certiorari denied by 125 So. 3d 658, 2013 Miss. LEXIS 598 (Miss. 2013), writ of certiorari denied by 125 So. 3d 658, 2013 Miss. LEXIS 601 (Miss. 2013), writ of certiorari denied by



125 So. 3d 658, 2013 Miss. LEXIS 610  
(Miss. 2013).

## CHAPTER 9

### Trusts and Trustees

#### ARTICLE 3.

#### UNIFORM TRUSTEES' POWERS.

### § 91-9-107. Powers of trustee conferred by this article.

#### JUDICIAL DECISIONS

##### 1. In general.

Debtor breached his fiduciary duty to lenders under Mississippi law by commingling trust funds with personal funds and using those commingled trust funds for a purpose other than for what they were

intended, resulting in losses to creditor, a title insurance company. *Fid. Nat'l Title Ins. Co. v. Colson (In re Colson)*, — Bankr. —, 2013 Bankr. LEXIS 4001 (Bankr. S.D. Miss. Sept. 23, 2013).

# TITLE 93

## DOMESTIC RELATIONS

Chapter 13. Guardians and Conservators .....	93-13-1
--	---------

### CHAPTER 5

#### Divorce and Alimony

##### § 93-5-1. Causes for divorce.

#### JUDICIAL DECISIONS

##### 6. Desertion.

Chancellor did not err in granting a wife a divorce on the ground of desertion because (1) the chancellor determined that the husband offered no testimony to contradict the wife's assertion that the husband left the marital home and failed to

return or resume any marital duties; and (2) the husband offered no proof that his failure to return to the home was the wife's fault. *Gardner v. Gardner*, — So. 3d —, 2013 Miss. App. LEXIS 624 (Miss. Ct. App. Sept. 24, 2013).

##### § 93-5-2. Divorce on ground of irreconcilable differences.

#### JUDICIAL DECISIONS

2. Applicability.
6. Child custody, support.
9. Written consent.
12. Illustrative cases.

##### 2. Applicability.

Chancery court did not err by not equitably dividing a husband's military retirement when granting the parties a divorce based on irreconcilable differences because the wife signed a consent agreement wherein the wife indicated the chancery court only needed to resolve one disputed issue related to whether she had misappropriated \$ 46,000 from the husband. *Gordon v. Gordon*, 126 So. 3d 922 (Miss. Ct. App. 2013), writ of certiorari denied by 127 So. 3d 1115, 2013 Miss. LEXIS 631 (Miss. 2013).

##### 6. Child custody, support.

Although a chancery court erred in granting the parties a divorce based on irreconcilable differences without addressing custody or support of their seventeen-year-old child, who was residing with his older sister, the error was harm-

less and the issue was moot because the child was no longer a minor and the parties were no longer obligated to pay child support for him. *Gordon v. Gordon*, 126 So. 3d 922 (Miss. Ct. App. 2013), writ of certiorari denied by 127 So. 3d 1115, 2013 Miss. LEXIS 631 (Miss. 2013).

##### 9. Written consent.

Although both parties orally consented to a divorce on the ground of irreconcilable differences, because this statute required that consent to a divorce had to be in writing and signed by both parties personally, the chancellor committed manifest error by not getting consent to the divorce in writing and by granting the divorce. *Reno v. Reno*, 119 So. 3d 1154 (Miss. Ct. App. 2013).

##### 12. Illustrative cases.

Where a husband and wife, in attempting to obtain an irreconcilable-differences divorce, never fully complied with either Miss. Code Ann. § 93-5-2(2) or (3), as their signed consent agreement did not set forth any issues for the chancellor to de-

cide, and their purported settlement did not settle all property rights, the chancellor erred in granting a final divorce. *Sanford v. Sanford*, 124 So. 3d 647 (Miss. 2013).

Because the wife acknowledged that she was entering into a binding agreement to divorce the husband pursuant to the terms of the settlement and on the basis of irreconcilable differences, she withdrew her fault-based divorce grounds, and their property-settlement agreement was executed in writing and signed by both par-

ties, she could not later renegotiate the nature or the terms of the divorce. *Keith v. Keith*, 121 So. 3d 967 (Miss. Ct. App. 2013).

Consent agreement was not invalid. Miss. Code Ann. § 93-5-2 did not require it to be notarized or signed by an attorney; furthermore, the husband's attempt to withdraw or expunge the agreement after the divorce decree was entered did not invalidate it. *McNeese v. McNeese*, 119 So. 3d 264 (Miss. 2013).

## § 93-5-7. Conduct of divorce proceedings.

### JUDICIAL DECISIONS

#### 2. Other action, proceedings; res judicata.

Wife's claims against her husband which she brought in circuit court that were more closely related to the parties' marital relationship and financial affairs had to be decided in chancery court; her claims against him for intentional and negligent infliction of emotional distress, along with her alienation of affection claims against his alleged paramour, were purely legal and were properly before the circuit court. *Germany v. Germany*, 123 So. 3d 423 (Miss. 2013).

As a wife's conversion claim against her husband was really a request for a award of marital assets that ordinarily would be distributed in the divorce action, the circuit court erred in denying the husband's motion to transfer that claim to the par-

ties' divorce action which was pending in chancery court. *Germany v. Germany*, 123 So. 3d 423 (Miss. 2013).

Circuit court erred in denying a husband's motion to transfer his wife's claim for unjust enrichment to the parties' divorce action which was pending in chancery court, because 1) it was an equitable claim, and 2) to allow her to pursue that claim in circuit court could lead to a double recovery if she was awarded alimony by the chancery court. *Germany v. Germany*, 123 So. 3d 423 (Miss. 2013).

As the substance of a wife's breach-of-contract and fraud claims against her husband was related to divorce and alimony, the circuit court erred in denying the husband's motion to transfer those claims to the parties' divorce action which was pending in chancery court. *Germany v. Germany*, 123 So. 3d 423 (Miss. 2013).

## § 93-5-23. Custody of children; alimony; effect of military duty on custody and visitation.

### JUDICIAL DECISIONS

#### I. ALIMONY.

2. Factors in determining whether alimony should be granted.
6. —Financial considerations.
9. Amount of payments; generally.

11. — Lump sum payments.

#### II. CUSTODY.

18. Factors in determining award of custody.



### III. SUPPORT OF CHILDREN.

- 23. Amount of support.
- 27. Termination or nonsupport.

### V. MODIFICATION OF DECREE.

- 36. Custody; generally.
- 39. —Evidence.
- 45. Visitation.
- 50. Retirement, pension.

### VII. OTHER MATTERS.

- 62. Property division.
- 63. Attorney fees; generally.

### I. ALIMONY.

#### 2. Factors in determining whether alimony should be granted.

#### 6. —Financial considerations.

Trial court did not err in awarding a wife \$ 1,000 per month as permanent alimony because the parties were married 26 years, the majority of marital assets received by the wife consisted of retirement accounts that she could not use for living expenses without incurring substantial tax penalties, the husband earned considerably more income than the wife and had the potential for his income to increase further through promotions, and the husband was primarily at fault for the collapse of the marriage. *Myrick v. Myrick*, 122 So. 3d 93 (Miss. Ct. App. 2013).

#### 9. Amount of payments; generally.

#### 11. — Lump sum payments.

Mississippi chancery court's order requiring a Chapter 7 debtor to pay his ex-wife \$550,000 as "lump-sum alimony" and \$35,110 in attorney's fees created debts that were nondischargeable under former 11 U.S.C.S. § 523; the court's award was intended as support in the nature of alimony so the debtor's ex-wife could retain the standard of living she enjoyed while she was married to the debtor. *Rustin v. Rustin* (In re Rustin), — Bankr. —, 2011 Bankr. LEXIS 5728 (Bankr. S.D. Miss. Nov. 9, 2011).

### II. CUSTODY.

#### 18. Factors in determining award of custody.

Chancellor erred by awarding a maternal grandmother custody of a child because the chancellor failed to apply the legal presumption that it was in the child's best interest for her father to have custody; the chancellor treated the particular custody battle as a modification, failing to recognize that the grandmother had no right to custody as against the father. *Wilson v. Davis*, 111 So. 3d 1280 (Miss. Ct. App. 2013).

### III. SUPPORT OF CHILDREN.

#### 23. Amount of support.

In calculating child support, the trial court abused its discretion in attributing any future rental income to the husband, as it had awarded the rental property to the wife. *Collins v. Collins*, 112 So. 3d 428 (Miss. 2013).

In calculating child support, the trial court erred in arbitrarily determining a husband's monthly income to exclusion of the undisputed evidence he provided, due to his failure to comply with Miss. Unif. Ch. Ct. R. 8.05, because the remedy for his violation was to hold him in contempt, not to disregard the credible evidence he provided. *Collins v. Collins*, 112 So. 3d 428 (Miss. 2013).

#### 27. Termination or nonsupport.

Because the chancellor found that the children were emancipated, as they were 24 and 22 years old at the time of the 2012 order, the chancellor erred in requiring the father to pay child support, college expenses, and life and health insurance for the benefit of the children. *Archie v. Archie*, 126 So. 3d 937 (Miss. Ct. App. 2013).

Chancery court did not abuse its discretion by declining to require a parent to provide post-majority financial support for the parent's child because Mississippi law did not vest the court with the authority to mandate that parents financially support their offspring post-majority. The duty imposed for a parent to support its child does not extend beyond the child's minority, which terminates when the child

reaches twenty-one years of age. *Hays v. Alexander*, 114 So. 3d 704 (Miss. 2013).

## V. MODIFICATION OF DECREE.

### 36. Custody; generally.

#### 39. —Evidence.

Chancery court properly weighed the Albright factors and modified custody of the parties' children to the mother because the father and the stepmother smoked in the presence of the children, who had allergy problems, and the mother was the primary parent to take the children to the doctor and wand visit their school, while the father only remembered going to the school once; the mother was granted sole legal and physical custody. *Tidmore v. Tidmore*, 114 So. 3d 753 (Miss. Ct. App. 2013).

#### 45. Visitation.

Chancery court did not abuse its discretion in granting visitation to a father because the father was awarded two weekends per month, six weeks in the summer, and holidays every other year, and "liberal visitation," at a minimum, meant two weekends a month and five weeks during the summer. *Tidmore v. Tidmore*, 114 So. 3d 753 (Miss. Ct. App. 2013).

#### 50. Retirement, pension.

Modification and reduction of a payor spouse's monthly alimony obligation was appropriate because the spouse's unanticipated, health-based retirement was an after-arising, material change in circum-

stances. However, remand was necessary because it was not apparent that the chancellor considered the spouse's ability to pay the decreased award, as the unchallenged figures representing each party's income and expenses showed that the spouse suffered a monthly deficit after paying alimony. *Peterson v. Peterson*, — So. 3d —, 2013 Miss. App. LEXIS 777 (Miss. Ct. App. Nov. 19, 2013).

## VII. OTHER MATTERS.

### 62. Property division.

Chancellor acted within her discretion in choosing the date of the divorce, rather than the date of a temporary support order, to mark the point of demarcation between marital and separate property. To the extent that *Pittman v. Pittman*, 791 So. 2d 857 (Miss. Ct. App. 2001), could be read to create a rule that a temporary support order always and necessarily indicated the point of demarcation, the Mississippi Supreme Court overruled it. *Collins v. Collins*, 112 So. 3d 428 (Miss. 2013).

### 63. Attorney fees; generally.

Although a chancery court properly awarded attorney's fees to a father for defending against the mother's baseless abuse allegations, Miss. Code Ann. § 93-5-23, and for the mother's contemptuous conduct, the court erred in awarding the full amount of the attorney's bill because at least part of the fees awarded were for custody modification proceedings, for which attorney's fees were not normally awarded. *Tidmore v. Tidmore*, 114 So. 3d 753 (Miss. Ct. App. 2013).

**§ 93-5-24. Types of custody awarded by court; joint custody; no presumption in favor of maternal custody; access to information pertaining to child by noncustodial parent; restrictions on custody by parent with history of perpetrating family violence; rebuttable presumption that such custody is not in the best interest of the child; factors in reaching determinations; visitation orders.**

## JUDICIAL DECISIONS

1. Factors affecting custody — In general.
8. —Miscellaneous.
10. Joint custody.



**1. Factors affecting custody — In general.****8. —Miscellaneous.**

Chancellor erred by awarding a maternal grandmother custody of a child because the chancellor failed to apply the legal presumption that it was in the child's best interest for her father to have custody; the chancellor treated the particular custody battle as a modification, failing to recognize that the grandmother had no right to custody as against the father. *Wilson v. Davis*, 111 So. 3d 1280 (Miss. Ct. App. 2013).

**10. Joint custody.**

Because a chancery court did not consider the propriety of granting joint physical custody, as the chancery court may have erroneously concluded that it was not authorized under Miss. Code Ann. § 93-5-24 to consider joint physical custody in an irreconcilable-differences divorce, reversal of the chancery court's judgment and remand of the case to the chancery court for it to reconsider its award of custody, including the propriety of awarding joint physical custody, was appropriate. *Clark v. Clark*, 126 So. 3d 122 (Miss. Ct. App. 2013).

**CHAPTER 9****Bastardy****UNIFORM LAW ON PATERNITY****§ 93-9-10. Disestablishment of paternity.****JUDICIAL DECISIONS****3. Disestablishment denied.**

In a case in which a father, who had a genetics test that excluded him as the father of a child, appealed a chancery court's denial of his petition to disestablish paternity, because he signed a stipulated agreement of paternity, the factual

scenario addressed by Miss. Code Ann. § 93-9-10(3)(c), that was approved by order of the chancery court, the chancery court properly denied his petition as presented. *Jones v. Mallett*, 125 So. 3d 650 (Miss. 2013).

**CHAPTER 11****Enforcement of Support of Dependents****IN GENERAL****§ 93-11-65. Custody and support of minor children; additional remedies; determination of emancipation; temporary support awarded pending determination of parentage; effect of military duty on custody and visitation.****JUDICIAL DECISIONS****II. SUPPORT OF CHILDREN.**

10. Generally.
14. Education or medical expenses.
21. Emancipation.

**II. SUPPORT OF CHILDREN.****10. Generally.**

Plaintiff's tort action based on events that occurred when he was 19 years old



was timely as it was filed less than three years after his 21st birthday; removal of the disability of minority did not arise automatically upon the occurrence of specified events except for reaching the age of 21, and thus, plaintiff's emancipation did not trigger the automatic removal of disability of minority. *Baker v. RR Brink Locking Sys.*, 721 F.3d 716 (5th Cir. 2013).

14. Education or medical expenses.

Chancellor abused the chancellor's discretion by requiring a parent to pay a lump sum toward the purchase of a vehicle for the parent's child as an educational expense to attend college because there was no evidence that the parent was financially able to pay the cost of the vehicle and the costs of the child's other college expenses. *Brooks v. Fields*, — So. 3d —, 2013 Miss. App. LEXIS 693 (Miss. Ct. App. Oct. 15, 2013).

Because the chancellor found that the children were emancipated, as they were 24 and 22 years old at the time of the 2012 order, the chancellor erred in requiring the father to pay child support, college expenses, and life and health insurance for the benefit of the children. *Archie v. Archie*, 126 So. 3d 937 (Miss. Ct. App. 2013).

21. Emancipation.

Although a chancery court erred in granting the parties a divorce based on irreconcilable differences without addressing custody or support of their seventeen-year-old child, who was residing with his older sister, the error was harmless and the issue was moot because the child was no longer a minor and the parties were no longer obligated to pay child support for him. *Gordon v. Gordon*, 126 So. 3d 922 (Miss. Ct. App. 2013), writ of certiorari denied by 127 So. 3d 1115, 2013 Miss. LEXIS 631 (Miss. 2013).

ORDERS FOR WITHHOLDING

§ 93-11-103. Entry of order for withholding; content; copies; duration; withholding from lump-sum payment made by employer to employee who owes child support arrearage.

JUDICIAL DECISIONS

1. Withholding order.

Trial court correctly complied with Miss. Code Ann. § 93-11-103 when he entered the order for withholding several days after the order for support was en-

tered. The statute applies to all orders issued or modified, not only to those found to be in arrears. *McNeese v. McNeese*, 119 So. 3d 264 (Miss. 2013).

CHAPTER 13

Guardians and Conservators

Wards, Generally .....	93-13-1
------------------------	---------

WARDS, GENERALLY

SEC.	
93-13-67.	Annual accounts; guardian's minimum commission; closure of guardianship file without final accounting under certain circumstances.

**§ 93-13-1. Parental guardianship of minor children.****JUDICIAL DECISIONS**

1. Custody in general.
2. Rights of father.
4. Custody in third persons.

**1. Custody in general.**

Divorced parent who had no authority to bind the estate of the parent's teenage child in a settlement could not bind the estate to an attorney's fee contract, particularly when such a contract would have to have been, but was not, approved by the chancery court. *In re Wilhite*, 121 So. 3d 301 (Miss. Ct. App. 2013).

**2. Rights of father.**

Chancery court did not err in granting custody to the father after finding that he had not deserted his child because there was no legally compelling reason to alter

or abandon the established standards for rebuttal of the natural-parent presumption; requiring the maternal grandmother first to demonstrate that the father had relinquished his right to parent his child was not an undue burden. *Davis v. Vaughn*, 126 So. 3d 33 (Miss. 2013).

**4. Custody in third persons.**

Law does not allow parental rights to supercede the best interests of the child; parental rights, as is true of other fundamental rights, can be forfeited or taken away, and the law does recognize some means by which third parties can overcome the law's preference of natural parents. *Davis v. Vaughn*, 126 So. 3d 33 (Miss. 2013).

**§ 93-13-67. Annual accounts; guardian's minimum commission; closure of guardianship file without final accounting under certain circumstances.**

(1) Except as herein provided, and as provided in Section 93-13-7, or 93-13-37 and 93-13-38, every guardian shall, at least once in each year, and oftener if required, exhibit his account, showing the receipts of money on account of his ward, and showing the annual product of the estate under his management, and the sale or other disposition thereof, and showing also each item of his expenditure in the maintenance and education of his ward and in the preservation and management of his estate, supported by legal vouchers. In the event that the account shall be presented by a bank or trust company which is subject to the supervision of the Department of Finance and Administration of the State of Mississippi or of the comptroller of the currency of the United States and such account, or the petition for the approval of same, shall contain a statement under oath by an officer of said bank or trust company showing that the vouchers covering the disbursements in the account presented are on file with the bank or trust company, the bank or trust company shall not be required to file vouchers. The bank or trust company shall produce the vouchers for inspection of any interested party or his or her attorney at any time during legal banking hours at the office of the bank or trust company; the court on its own motion or on the motion of any interested party may require that the vouchers be produced and inspected at any hearing of any objections to the annual account. The accounts shall be examined, approved, and allowed by the court in the same way that the accounts of executors and administrators are examined, approved, and allowed. Compliance with the duties required, in this section, of guardian shall be enforced by



the same means and in the same manner as is provided in respect to the accounts of executors and administrators.

(a) However, when the funds and personal property of the ward do not exceed the sum or value of Three Thousand Dollars (\$3,000.00) and there is no prospect of further receipt to come into the hands of the guardian other than interest thereon, or in guardianships in which the only funds on hand or to be received by the guardian are funds paid or to be paid by the Department of Human Services for the benefit of the ward, the chancery court or chancellor in vacation, may, for good cause shown, in his discretion and upon being satisfied it is to the best interest and welfare of the ward, authorize the guardian to dispense with further such annual accounts, except such as may be a final account. Furthermore, the chancery court or chancellor in vacation may dispense with annual accounts if the ward's assets consist solely of funds on deposit at any banking corporation, building and loan association or savings and loan association in this state; have been so deposited under order of the court to remain until otherwise ordered; are fully insured; and a certified copy of the order to deposit, properly receipted, furnished the depository. If the court, or chancellor in vacation, authorizes the discontinuance of annual accounts, the guardian may, without further order of the court, from time to time pay the court costs and bond premiums owing by the estate or him as guardian, and, as well, he may likewise pay emergency obligations as he may have been empowered and allowed to do by necessity except for this section; but, he shall not pay from guardianship funds any other sums without further order of such court or chancellor without having first obtained order of the court or chancellor to do so. If emergency expenditure is needed for the immediate and necessary welfare of the ward, it shall at once be reported to the court, or chancellor in vacation, for approval. Furthermore, the court on its own motion or on the motion of any interested party may require the resumption and continuance of annual accounts.

(b) At the time of any annual account, the court, or a judge thereof in vacation, in its discretion, may allow to the guardian a minimum commission of One Hundred Dollars (\$100.00) per annum for its services, anything in the statutes of this state to the contrary notwithstanding.

(2) If the ward was a minor and the guardianship terminates by any means upon the ward obtaining majority, if a final accounting is not made and the ward does not petition the court to compel a final accounting on or before July 1, 2014, or the twenty-second birthday of the ward, whichever comes last, the court may close its file on the guardianship unless it appears to the court that the court should seek accounting on its own motion.

**SOURCES:** Codes, Hutchinson's 1848, ch. 36, art. 1(128); 1857, ch. 60, art. 147; 1871, §§ 1214, 1215; 1880, § 2103; 1892, § 2222; 1906, § 2441; Hemingway's 1917, § 2002; 1930, § 1889; 1942, § 425; Laws, 1960, ch. 217, § 1; Laws, 1962, ch. 273; Laws, 1966, ch. 320, § 1; Laws, 1972, ch. 408, § 13; Laws, 1974, ch. 365; Laws, 2013, ch. 339, § 4; Laws, 2013, ch. 554, § 2, eff from and after July 2, 2013.



**Editor's Note** — This section was amended in 2013 to, among other things, substitute "Department of Finance and Administration" for "department of bank supervision of the State of Mississippi" in the second sentence of subsection (1). The reference should probably have been changed to "Mississippi Department of Banking and Consumer Finance." The section is set out above as amended by Section 2 of Chapter 554, Laws of 2013.

## CHAPTER 15

### Termination of Rights of Unfit Parents

#### § 93-15-103. Factors justifying adoption; grounds for termination of parental rights; alternatives.

##### JUDICIAL DECISIONS

1. Generally.
3. Abandonment or neglect.
4. Erosion of parent/child relationship.

##### 1. Generally.

Decision terminating a father's parental rights was proper, as testimony of the parties and witnesses, as well as a guardian ad litem's report and recommendation, supported a finding that the mother proved at least one of the grounds enumerated in the termination statute by clear and convincing evidence; the father acknowledged that the father had suffered from an alcohol addiction since 2005. *Chism v. Bright*, — So. 3d —, 2013 Miss. App. LEXIS 284 (Miss. Ct. App. May 21, 2013).

##### 3. Abandonment or neglect.

Termination of a parent's parental rights and support obligations to the parent's child was appropriate because the chancellor found by clear and convincing evidence that termination was in the best

interest of the child as the parent had not visited or communicated with the child in almost five years and had not financially supported her for more than four years. *Barnes v. McGee*, — So. 2d —, 2013 Miss. App. LEXIS 706 (Miss. Ct. App. Oct. 22, 2013).

##### 4. Erosion of parent/child relationship.

Termination of a parent's parental rights and support obligations to the parent's child was appropriate because the chancellor found by clear and convincing evidence that termination was in the best interest of the child as there had been a substantial erosion of the relationship between the parent and the child, which was caused at least in part by the parent's serious neglect, prolonged and unreasonable absence, and unreasonable failure to visit or communicate. *Barnes v. McGee*, — So. 2d —, 2013 Miss. App. LEXIS 706 (Miss. Ct. App. Oct. 22, 2013).

#### § 93-15-109. Termination of parental rights.

##### JUDICIAL DECISIONS

##### 2. Clear and convincing proof.

Termination of a parent's parental rights and support obligations to the parent's child was appropriate because the chancellor found by clear and convincing evidence that termination was in the best interest of the child as the parent had not

visited or communicated with the child in almost five years and had not financially supported the child for more than four years. *Barnes v. McGee*, — So. 2d —, 2013 Miss. App. LEXIS 706 (Miss. Ct. App. Oct. 22, 2013).

## CHAPTER 16

## Grandparents' Visitation Rights

## § 93-16-3. Who may petition for visitation rights; when; court in which to file petition.

## JUDICIAL DECISIONS

1. In general.
2. Attorney fees.
3. Visitation proper.

**1. In general.**

Right to grandparent visitation is purely statutory and may only be considered if the grandparent meets certain statutory criteria, and the criteria in Mississippi's grandparent-visitation statute are important; by placing limitations on who may petition for visitation, the criteria keep a grandparent's statutory right to visitation from impermissibly encroaching on the parents' rights to rear their children as they see fit. *Aydelott v. Quartaro*, 124 So. 3d 97 (Miss. Ct. App. 2013).

Broadening the limiting criterion of a "viable relationship" to grandparents who wish they had a viable relationship would render the grandparent-visitation statute unconstitutional because it would permit any grandparent to petition for visitation and not just those who meet the narrow circumstances under the statute. *Aydelott v. Quartaro*, 124 So. 3d 97 (Miss. Ct. App. 2013).

Because the chancellor did not give the grandparent-visitation statute the necessary narrower reading, his explicit finding of a viable relationship and implicit finding of unreasonable denial of visitation failed to pass constitutional muster; the chancellor erred in weighing the grandparents' wishes into whether there was a viable relationship and never explicitly found the parents had unreasonably denied the grandparents visitation. *Aydelott v. Quartaro*, 124 So. 3d 97 (Miss. Ct. App. 2013).

Chancellor erred in awarding grandparents visitation because they failed to show they met the criterion of the establishment of a viable relationship with their granddaughters; the chancellor erred in ignoring the grandparents' admissions and permitting contradictory testimony that they had contributed financially and had frequently visited the grandchildren because they never moved for withdrawal or amendment of their admissions. *Aydelott v. Quartaro*, 124 So. 3d 97 (Miss. Ct. App. 2013).

**2. Attorney fees.**

Chancellor did not abuse his discretion in denying parents' request for attorney's fees because the chancellor found no financial hardship would result from their having to pay their own attorney's fees based on the parents' combined income and expenses left sufficient disposable income for travel and entertainment and extra vehicles, *Aydelott v. Quartaro*, 124 So. 3d 97 (Miss. Ct. App. 2013).

**3. Visitation proper.**

It was within a chancellor's discretion to award greater than usual grandparent visitation because the chancellor found that the grandparents had participated extensively in the life of their late son's child from when the child was approximately four and a half months old and the child's mother had a history of substance abuse, had neglected her children, and had surrendered the child, along with her two other illegitimate children, to her mother when she sought treatment for substance abuse. *Arrington v. Thrash*, 122 So. 3d 144 (Miss. Ct. App. 2013).

## CHAPTER 17

## Adoption, Change of Name, and Legitimation of Children

## IN GENERAL

**§ 93-17-5. Parties to adoption proceeding; consent of child; unmarried father's rights.**

## JUDICIAL DECISIONS

## I. UNDER CURRENT LAW.

## 4. Consent to adopt.

## I. UNDER CURRENT LAW.

## 4. Consent to adopt.

While it was undisputed that a child's biological father did not receive formal notice of the adoption of his son, this did not void the adoption of the son as, even if the father had received notice, he did not meet the standard of demonstrating a full

commitment to the responsibilities of parenthood under Miss. Code Ann. § 93-17-5(3), which would have allowed him, as an unwed father, to object to the adoption. There was no evidence that the father provided support for the child, that he tried to visit with the child, or that he was now willing and able to assume physical care for the child. In re Adoption of a Minor Child v. M.J.W., 111 So. 3d 1243 (Miss. Ct. App. 2013).

**§ 93-17-6. Petition for determination of rights in proposed adoption of natural child; service of process in the adoption of a foreign born child.**

## JUDICIAL DECISIONS

## 2. Consent to adopt.

While it was undisputed that a child's biological father did not receive formal notice of the adoption of his son, this did not void the adoption of the son as, even if the father had received notice, he did not meet the standard of demonstrating a full commitment to the responsibilities of parenthood under Miss. Code Ann. § 93-17-

5(3), which would have allowed him, as an unwed father, to object to the adoption. There was no evidence that the father provided support for the child, that he tried to visit with the child, or that he was now willing and able to assume physical care for the child. In re Adoption of a Minor Child v. M.J.W., 111 So. 3d 1243 (Miss. Ct. App. 2013).



**§ 93-17-7. Parental objection; causes for termination of unfit parents' rights.**

**JUDICIAL DECISIONS**

**I. UNDER CURRENT LAW.**

5. Grounds for termination — Abandonment or desertion.

**I. UNDER CURRENT LAW.**

5. Grounds for termination — Abandonment or desertion.

Court properly terminated a seven-year-old child's parents' parental rights

and allowed the child's adoption, as there was substantial evidence that the parents suffered from chemical dependency, the mother admitted that the mother never bought any food or clothes for the child, and the parents had never provided consistent individual care of the child. *Little v. Norman*, 119 So. 3d 382 (Miss. Ct. App. 2013).

**CHAPTER 19**

**Removal of Disability of Minority**

**§ 93-19-9. Terms of decree.**

**JUDICIAL DECISIONS**

**1. In general.**

Plaintiff's tort action based on events that occurred when he was 19 years old was timely as it was filed less than three years after his 21st birthday; removal of the disability of minority did not arise automatically upon the occurrence of

specified events except for reaching the age of 21, and thus, plaintiff's emancipation did not trigger the automatic removal of disability of minority. *Baker v. RR Brink Locking Sys.*, 721 F.3d 716 (5th Cir. 2013).

# TITLE 95

## TORTS

### CHAPTER 1

#### Libel and Slander

#### § 95-1-1. Certain words actionable.

##### JUDICIAL DECISIONS

1. In general.
5. Actionable words, in general.
6. —Words actionable per se.
- 1. In general.**  
Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572 (1946).
- 5. Actionable words, in general.**
- 6. —Words actionable per se.**  
Veteran's claim of slander per se was properly dismissed by the trial court, as

labeling him as a thief and a dishonest person was an insult that might have lead to a breach of the peace under Miss. Code Ann. § 95-1-1, but it did not relieve the veteran of his obligation to prove special damages. Cook v. Wallot, — So. 3d —, 2013 Miss. App. LEXIS 245 (Miss. Ct. App. May 7, 2013).





# TITLE 97

## CRIMES

### CHAPTER 1

#### Conspiracy, Accessories and Attempts

#### § 97-1-1. Conspiracy.

##### JUDICIAL DECISIONS

9. Evidence.

14.5. — Sufficiency; conspiracy.

#### 9. Evidence.

##### 14.5. — Sufficiency; conspiracy.

Evidence was sufficient to convict defendant of conspiracy because one of the co-conspirator's was seen in defendant's vehicle armed with a shotgun; she followed the instructions of another co-conspirator instructing her to block the road after the victims entered, ensuring that the victims would be exposed to an attack; she drove one of the co-conspirator's away from the scene; and she returned later to look for one of the victims while evidencing hostile intent. *Hayes v. State*, — So. 3d —, 2013 Miss. App. LEXIS 744 (Miss. Ct. App. Nov. 5, 2013).

Defendant's conspiracy conviction was not against the overwhelming weight of the evidence because there was strong circumstantial evidence of a prior understanding to kill in the coordinated actions

of the participants. *Hayes v. State*, — So. 3d —, 2013 Miss. App. LEXIS 744 (Miss. Ct. App. Nov. 5, 2013).

Sufficient evidence supported defendant's conviction for conspiracy to commit murder, even though there was no express agreement between defendant and two co-defendants, because the evidence showed that defendant and co-defendants, while engaged in different acts, all pursued the common object of the victim's death, and the State was not required to prove the existence of an express agreement to murder the victim. *Graham v. State*, 120 So. 3d 382 (Miss. 2013).

Evidence supported defendant's conviction of conspiracy, as defendant admitted at trial that defendant intended to cook methamphetamine, in a bedroom where defendant's associates were sleeping police officers found 156 dosage units of pseudoephedrine, and in one associate's truck officers found a receipt for the purchase of pseudoephedrine. *Edmonds v. State*, 125 So. 3d 98 (Miss. Ct. App. 2013).

#### § 97-1-5. Accessories after the fact; punishment.

##### JUDICIAL DECISIONS

#### 4. Instructions.

Circuit court did not err when it refused a proposed accessory after the fact instruction because there was no evidence that defendant acted to help an accomplice avoid being punished for killing the victim as the accomplice testified that defendant shot the victim twice in the back, but defendant chose not to testify.

*Leagea v. State*, — So. 3d —, 2013 Miss. App. LEXIS 692 (Miss. Ct. App. Oct. 15, 2013).

Defendant juvenile was not entitled to an accessory-after-the-fact instruction since defendant's involvement in the underlying robbery began earlier in the day when the group decided to go "hit a lick" and headed to the gas station where the

victim was killed. *Hye v. State*, — So. 3d —, 2013 Miss. App. LEXIS 292 (Miss. Ct. App. May 28, 2013).

## CHAPTER 3

### Crimes Against the Person

#### § 97-3-7. Simple assault; aggravated assault; simple domestic violence; aggravated domestic violence.

#### JUDICIAL DECISIONS

- 4.5. Serious bodily harm.
- 5. Indictment or affidavit; generally.
- 10. Evidence; generally.
- 15. — Sufficiency.
- 16. — — Charge or conviction supportable.
- 19. Instructions; generally.
- 23. — Lesser offense.
- 26. Sentence.
- 28. Miscellaneous.

##### 4.5. Serious bodily harm.

Jury could have reasonably determined that defendant's use of teeth was sufficient to cause serious bodily harm, as the injury sustained when defendant bit off a piece of the victim's ear was a "sharp trauma." *Shaw v. State*, — So. 3d —, 2013 Miss. App. LEXIS 662 (Miss. Ct. App. Oct. 8, 2013).

##### 5. Indictment or affidavit; generally.

Where an indictment charged appellant with violating former Miss Code Ann. § 97-3-7(2)(b), but the intent language in the indictment was that of former § 97-3-7(2)(a), that the trial court allowed the State to amend the indictment did not entitle appellant to post-conviction relief because 1) he given fair notice of the crimes with which he was charged; 2) he did not object to the amendments; 3) they were of form and not substance; 4) they did not prejudice him; and 5) his valid guilty plea waived any defects of form in the indictment. *Montalto v. State*, 119 So. 3d 1087 (Miss. Ct. App. 2013), writ of certiorari dismissed by 127 So. 3d 1115, 2013 Miss. LEXIS 635 (Miss. 2013).

##### 10. Evidence; generally.

##### 15. — Sufficiency.

Evidence that defendant was antagonizing the victim, who attempted to restrain defendant to prevent defendant from hitting him, and that defendant retaliated and bit off part of the victim's ear was sufficient to defeat defendant's motion for JNOV as to the charge of aggravated assault. *Shaw v. State*, — So. 3d —, 2013 Miss. App. LEXIS 662 (Miss. Ct. App. Oct. 8, 2013).

In an aggravated assault case, the verdict was not against the overwhelming weight of the evidence because the jury obviously rejected defendant's theory that he was acting in self-defense and that the victim, who defendant alleged was the aggressor, inadvertently stabbed himself five times during the scuffle. *Ross v. State*, 121 So. 3d 278 (Miss. Ct. App. 2013).

Evidence was sufficient to convict defendant of aggravated assault as the victim testified that he saw defendant coming toward him with a butcher knife, that they wrestled, and that he received multiple stab wounds before the knife's blade and handle broke; and the State proved that defendant was not acting in self-defense. *Ross v. State*, 121 So. 3d 278 (Miss. Ct. App. 2013).

Evidence was sufficient to convict defendant of aggravated assault in the attempted shooting of the victim, and the verdict was not against the overwhelming weight of the evidence, because defendant had lost a fight with the victim and was bloodied and humiliated; immediately be-



fore the shooting, defendant threatened the victim; and the jury could have concluded that defendant simply missed when he tried to shoot the victim. *Winn v. State*, 127 So. 3d 289 (Miss. Ct. App. 2013).

Evidence was sufficient to find defendant guilty of aggravated domestic violence by either strangulation or attempted strangulation because the record contained evidence that defendant intentionally blocked the nose or mouth of the victim by any means. *Clark v. State*, 122 So. 3d 129 (Miss. Ct. App. 2013).

Evidence was sufficient to convict defendant of aggravated assault and armed robbery and the verdicts were not against the weight of the evidence as he was present, consenting, aiding, and abetting the commission of the robbery by one of the accomplices, and the two accomplices' testimony was more than slightly supported by corroborating eyewitness testimony and forensic evidence. *Grossley v. State*, 127 So. 3d 1143 (Miss. Ct. App. 2013), writ of certiorari denied by 2014 Miss. LEXIS 26 (Miss. Jan. 9, 2014).

Sufficient evidence supported defendant's conviction for aggravated assault because even if the victim's alleged gun had been found, the jury still could have concluded defendant was the aggressor, the shooting resulted from mutual combat, or even that the victim was reaching for his own gun in self-defense. *Wansley v. State*, 114 So. 3d 793 (Miss. Ct. App. 2013), writ of certiorari denied by 127 So. 3d 1115, 2013 Miss. LEXIS 655 (Miss. 2013).

Conviction of aggravated assault was supported by sufficient evidence where an officer's testimony that defendant became a suspect in the shooting did not constitute an inadmissible identification, and the victim's identification of defendant as the shooter was uncontradicted, as was the victim's account of the entire incident. *Keithley v. State*, 111 So. 3d 1202 (Miss. 2013).

#### **16. — — Charge or conviction supportable.**

Defendant's conviction for aggravated assault was not against the overwhelming weight of the evidence because three witnesses all testified that he was firing a

shotgun from behind a big pine tree near the road; the witnesses' testimony was corroborated by a spent shotgun shell which was recovered near the tree and by some of the wounds of one of the victims that were attributed to a shotgun; and another witness saw defendant with the shotgun shortly before the shooting. *Hayes v. State*, — So. 3d —, 2013 Miss. App. LEXIS 744 (Miss. Ct. App. Nov. 5, 2013).

Evidence was sufficient to convict defendant of simple assault and the verdict was not against the weight of the evidence because defendant presented no evidence that he feared imminent death or great bodily harm to himself or to his daughter justifying the use of force; defendant pinned the victim in the door of his vehicle; and the victim testified that she called out in pain several times and had bruises as a result of the incident. *Matthews v. City of Madison*, — So. 3d —, 2013 Miss. App. LEXIS 611 (Miss. Ct. App. Sept. 17, 2013).

Evidence was sufficient to find defendant guilty of aggravated assault because the victim identified defendant as the shooter in a photo lineup prior to trial and another eyewitness identified defendant at trial as the person who shot the victim. *Haywood v. State*, — So. 3d —, 2013 Miss. App. LEXIS 290 (Miss. Ct. App. May 28, 2013), writ of certiorari denied by 2014 Miss. LEXIS 77 (Miss. Jan. 30, 2014).

#### **19. Instructions; generally.**

##### **23. — Lesser offense.**

In a felonious child abuse case, because the child's burns were not caused by a child exploring her environment, the doctor who treated her unequivocal opined that the burns were nonaccidental, the burns came from a hot, solid object, and no reasonable juror could find the child's second-degree burns on nondominant fingers were not considered serious bodily harm, the trial court did not err in refusing to instruct the jury on the lesser-offense of simple assault. *Harris v. State*, 123 So. 3d 925 (Miss. Ct. App. 2013).

Trial court's refusal to give a jury instruction on simple assault as a lesser included offense of aggravated assault was proper since: (1) defendant did not



present sufficient evidence of negligence since if all of the shots that hit the victim were fired as a result of a struggle, then defendant acted in self-defense, which was inconsistent with negligence; (2) defendant's testimony that he squeezed the trigger once but did not know if he shot the victim was too tenuous for a negligence finding; and (3) squeezing the trigger and hitting the victim caused serious bodily harm, which meant that the case was definitely an aggravated assault case. *Gilmore v. State*, 119 So. 3d 278 (Miss. 2013).

Because, in attempting to prove assault, the State introduced evidence that defendant began swinging at an officer while he was being arrested, and it would have been impossible for defendant to have committed simple assault on a law enforcement officer without committing the crime of resisting arrest, the offense of resisting arrest was a lesser-included offense of the charged crime of simple assault, and the trial judge was authorized to grant the State's request for a resisting-arrest instruction. *Edwards v. State*, 124 So. 3d 105 (Miss. Ct. App. 2013).

## 26. Sentence.

Inmate's ineffective assistance claim failed as: (1) the claim was time-barred under Miss. Code Ann. § 99-39-5(2); (2) the inmate had entered a best interests plea and did not show that but for counsel's errors, he would have insisted on going to trial; (3) the inmate did not deny that he was the driver of the vehicle or that he injured the three victims; (4) with his attorney's help, he was able to enter a

best interest plea to one of three aggravated assault charges, and his possible 60-year sentence under Miss. Code Ann. § 97-3-7(2)(a) was reduced to a possible 20-year sentence, of which 18 years and 10 months were post-release supervision; and (5) the inmate was ordered to serve the time he had served while awaiting sentencing, and the sentence effectively released him from prison immediately to start his post-release supervision. *Sims v. State*, — So. 2d —, 2013 Miss. App. LEXIS 102 (Miss. Ct. App. Mar. 5, 2013).

## 28. Miscellaneous.

Appellate counsel properly found that there were no arguable issues for appeal because defendant received proper notice of the aggravated-assault charge, he exercised his right to testify in his defense, he was granted a jury instruction on his theory of self-defense, his 12-year sentence was within the statutory minimum and maximum, and the jury's guilty verdict was not against the overwhelming weight of the evidence and was supported by sufficient evidence. *Moore v. State*, 119 So. 3d 1116 (Miss. Ct. App. 2013).

Defendant was not entitled to a new trial on an aggravated assault charge as, despite defendant's account to the contrary, the jury was entitled to believe the victim's detailed account to find that defendant purposely and knowingly shot the victim, that defendant was the aggressor, and that he did not act in self-defense, and certain facts in defendant's testimony were contradicted by two officers' testimonies. *Gilmore v. State*, 119 So. 3d 278 (Miss. 2013).

## § 97-3-15. Homicide; justifiable homicide; use of defensive force; duty to retreat.

### JUDICIAL DECISIONS

4. Self-defense; generally.
5. —Evidence.
7. Instructions; generally.
8. —Self-defense.

#### 4. Self-defense; generally.

#### 5. —Evidence.

Evidence was sufficient to convict defendant of simple assault and the verdict was

not against the weight of the evidence because defendant presented no evidence that he feared imminent death or great bodily harm to himself or to his daughter justifying the use of force; defendant pinned the victim in the door of his vehicle; and the victim testified that she called out in pain several times and had bruises as a result of the incident. Mat-

thews v. City of Madison, — So. 3d —, 2013 Miss. App. LEXIS 611 (Miss. Ct. App. Sept. 17, 2013).

There was sufficient evidence to convict defendant of manslaughter in violation of Miss. Code Ann. § 97-3-35 because the State put on evidence tending to show that defendant had a deliberate design to kill the victim, and there was corroborated testimony that the victim was neither confronting nor threatening defendant at the time he was shot. Vaughn v. State, 111 So. 3d 1289 (Miss. Ct. App. 2013).

Evidence supported defendant's convictions for two counts of murder, under Miss. Code Ann. § 97-3-19, including that defendant was not acting in necessary self-defense, because two eyewitnesses testified that defendant shot the victims in a bar and a forensic pathologist testi-

fied as to the nature of the victims' wounds. Copple v. State, 117 So. 3d 651 (Miss. Ct. App. 2013).

#### 7. Instructions; generally.

#### 8. —Self-defense.

Defendant was denied her right to have the jury properly instructed on her self-defense claim because enough evidence was presented at defendant's trial to at least raise a question as to whether she was entitled to the "Castle Doctrine" statutory presumption; a question arose to whether the victim was trespassing when she crossed the street, came onto the property surrounding defendant's residence, and prevented defendant from leaving by blocking her access to her vehicle. White v. State, 127 So. 3d 170 (Miss. 2013).

### § 97-3-17. Homicide; excusable homicide.

#### JUDICIAL DECISIONS

#### 4. Instructions to jury.

Jury instruction granted by the circuit court did not correctly state the applicable law on accident since it lacked all the elements; the jury should have been privy

to all subsections of the statute to determine if any of them subsections applied to defendant's case. McTiller v. State, 113 So. 3d 1284 (Miss. Ct. App. 2013).

### § 97-3-19. Homicide; murder defined; first-degree murder; second-degree murder; capital murder; lesser-included offenses.

#### JUDICIAL DECISIONS

##### I. IN GENERAL.

4. Sentence.
12. Defenses; generally.
21. Indictment.

##### II. EVIDENTIARY MATTERS.

37. Admissibility; generally.
41. —Photographs, other prejudicial evidence.
42. — —Photographs as admissible.
44. Circumstantial evidence.
49. Sufficiency of evidence; generally.
50. — Conviction sustained — murder.

51. — — Capital murder.

##### III. INSTRUCTIONS.

55. Failure to give manslaughter instruction—where accused fails to request.
57. —Where evidence does not support manslaughter.
58. —Where underlying offense is robbery.
59. Manslaughter instruction given where evidence sufficient for murder.



71. Instructions properly denied.

## I. IN GENERAL.

### 4. Sentence.

As defendant was 15 at the time of the murder and pursuant to Miss. Code Ann. § 47-7-3(1)(h) was not eligible for parole, and as *Miller v. Alabama*, 2012 U.S. LEXIS 4873, was decided while his appeal was pending, his life sentence was vacated and the case was remanded so the trial court could consider the Miller factors before determining sentence. *Parker v. State*, 119 So. 3d 987 (Miss. 2013).

### 12. Defenses; generally.

In a murder prosecution, the trial court did not abuse its discretion by refusing to instruct the jury on imperfect self-defense because the requested instruction was without foundation in the evidence. The only theory presented through witnesses called by the defense was that defendant was not the shooter, and no evidence was presented that defendant feared the victim or believed the victim to be a threat. *Morgan v. State*, 117 So. 3d 619 (Miss. 2013).

### 21. Indictment.

Defendant juvenile's indictment was not defective because the capital-murder statute was cited in the heading of the indictment but not the body of the indictment since the indictment listed the appropriate section and subsection in the heading and tracked the language of the statute in the body, and Miss. Code Ann. § 99-17-20 did not specify where the charged section and subsection number had to appear in the indictment. *Hye v. State*, — So. 3d —, 2013 Miss. App. LEXIS 292 (Miss. Ct. App. May 28, 2013).

Indictment for robbery was appropriate because defendant's due process rights were not violated as the indictment was not required to have specified the items alleged to have been taken in the robbery. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

## II. EVIDENTIARY MATTERS.

### 37. Admissibility; generally.

Circuit court did not abuse its discretion in excluding the victim's toxicology results because defendant, throughout trial,

maintained that defendant killed the victim in the heat of passion. Therefore, the victim's toxicology results were irrelevant. *Bradshaw v. State*, — So. 3d —, 2013 Miss. App. LEXIS 858 (Miss. Ct. App. Dec. 10, 2013).

### 41. —Photographs, other prejudicial evidence.

### 42. —Photographs as admissible.

In defendant's murder case, Miss. Code Ann. § 97-3-19, although photographs of the victim's decomposing body and head surrounded by maggots were not pleasant, only some probative value was needed to support admission of the gruesome photographs, and the State did not include photographs that showed his arms and legs eaten away by scavengers. *Bonds v. State*, — So. 3d —, 2013 Miss. App. LEXIS 369 (Miss. Ct. App. June 18, 2013).

### 44. Circumstantial evidence.

Trial court did not err in convicting defendant of murdering her husband; the State proved deliberate-design murder, albeit by circumstantial evidence, because the use of a high-powered rifle was sufficient to supply the necessary ingredient of deliberate design. *Childs v. State*, — So. 2d —, 2013 Miss. LEXIS 302 (Miss. May 23, 2013).

### 49. Sufficiency of evidence; generally.

### 50. — Conviction sustained — murder.

Defendant's conviction for deliberate-design murder was not against the weight of the evidence because (1) any intoxication on defendant's behalf was voluntary and could not be used to reduce the crime from murder to manslaughter; (2) there was no evidence that defendant and the victim were engaged in mutual combat at the time when defendant killed the victim; and (3) defendant, after hitting the victim in the head with a baseball bat, stabbed the victim with a knife to put the victim out of misery. *Bradshaw v. State*, — So. 3d —, 2013 Miss. App. LEXIS 858 (Miss. Ct. App. Dec. 10, 2013).

Evidence was sufficient and the weight of the evidence supporting the verdict finding defendant guilty of murder was substantial because the eyewitnesses



maintained that defendant walked up behind the victim, unprovoked, and shot him in the back; the victim was unarmed; there was no case for self-defense; defendant was not in a heightened emotional state; and, regarding the previous alleged acts of violence by the victim against defendant, a two-month cooling off period could not be considered an immediate act of provocation for manslaughter. *Day v. State*, 126 So. 3d 1011 (Miss. Ct. App. 2013).

While there were discrepancies at trial, because the eyewitnesses consistently testified that defendant struck the victim with a blunt object, and the medical evidence confirmed that was the cause of the victim's death, the verdict finding defendant guilty of depraved-heart murder was not against the overwhelming weight of the evidence. *Thomas v. State*, — So. 3d —, 2013 Miss. App. LEXIS 717 (Miss. Ct. App. Oct. 29, 2013).

Evidence was sufficient to convict defendant of depraved-heart murder because the two eyewitnesses' testimonies showed that defendant hit the victim in the head at least once while he was enraged at the victim; at no point before the victim was hit did he show aggression toward defendant; and the pathologist confirmed that the victim's death was caused by a blow to the left side of his head from a blunt object. *Thomas v. State*, — So. 3d —, 2013 Miss. App. LEXIS 717 (Miss. Ct. App. Oct. 29, 2013).

Weight and sufficiency of the evidence supported defendant's conviction for deliberate-design murder, as the evidence showed that he had retrieved a gun after a confrontation with the victim had ended, returned to the scene, and then shot the victim multiple times, even after the victim was lying in the street; the evidence did not support a verdict for manslaughter based on heat of passion, and did not support defendant's claim of self-defense. *Davis v. State*, — So. 3d —, 2013 Miss. App. LEXIS 490 (Miss. Ct. App. Aug. 13, 2013), writ of certiorari denied by 2014 Miss. LEXIS 73 (Miss. Jan. 30, 2014).

Evidence supported defendant's convictions for two counts of murder, including that defendant was not acting in necessary self-defense under Miss. Code Ann.

§ 97-3-15, because two eyewitnesses testified that defendant shot the victims in a bar and a forensic pathologist testified as to the nature of the victims' wounds. *Copple v. State*, 117 So. 3d 651 (Miss. Ct. App. 2013).

Defendant's conviction for deliberate design murder was not against the manifest weight of the evidence because defendant was physically present at the scene of the victim's murder, defendant gave the victim a concoction of water and crushed pills shortly before the victim was strangled, and the murder weapon, a blue dog leash, was found in defendant's trailer. *Graham v. State*, 120 So. 3d 382 (Miss. 2013).

Where defendant fatally shot his stepfather after he pushed defendant's mother onto a couch, the evidence was sufficient to convict defendant of deliberate-design murder as it established that neither he nor his mother was in danger, he admitted he could have handled the situation differently, and he had previously threatened the victim with a gun after the victim pushed the mother. *Barron v. State*, — So. 2d —, 2013 Miss. App. LEXIS 314 (Miss. Ct. App. June 4, 2013), writ of certiorari denied by 2014 Miss. LEXIS 61 (Miss. Jan. 23, 2014).

Defendant's conviction for murder, rather than manslaughter, was supported by evidence that defendant had the deliberate design to kill the victim, was aware of what he was doing, and planned it quickly. Between the altercation and the shooting, a period of 20 to 90 minutes passed according to the conflicting trial testimony, and defendant planned to and did go get his gun so he could carry out his plan to kill the victim. *Griffith v. State*, 123 So. 3d 472 (Miss. Ct. App. 2013), writ of certiorari denied by 2013 So. 3d 450, 2013 Miss. LEXIS 543 (Miss. 2013).

#### 51. — — Capital murder.

In a capital murder case, evidence was sufficient to sustain defendant's predicated sexual battery conviction because the evidence included the crime scene, the condition of the body, the victim's defensive wounds, and the "fresh" injury to her anus. The evidence showed the act occurred during the commission of her mur-

der. *Galloway v. State*, 122 So. 3d 614 (Miss. 2013).

Evidence supported defendant's conviction for capital murder with the underlying felony of robbery because defendant stated in a confession that defendant killed the victim during a fight, left the apartment for approximately an hour and a half, and then returned and began a clean-up effort when defendant was discovered by a sheriff's deputy. Other evidence showed that defendant used the victim's cash and credit card to purchase cleaning supplies with which to conceal the crime. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

### III. INSTRUCTIONS.

**55. Failure to give manslaughter instruction—where accused fails to request.**

**57. —Where evidence does not support manslaughter.**

Defendant, who was convicted of capital murder with the underlying felony of robbery, was not entitled to a manslaughter instruction because there was no evidentiary basis for an imperfect-self-defense, fighting words, or depraved heart murder theory. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

## § 97-3-21. Homicide; penalty for first- or second-degree murder or capital murder.

### JUDICIAL DECISIONS

0.5. Constitutionality.

1. Validity.

#### 0.5. Constitutionality.

As defendant was 15 at the time of the murder and pursuant to Miss. Code Ann § 47-7-3(1)(h) was not eligible for parole, and as *Miller v. Alabama*, 2012 U.S. LEXIS 4873, was decided while his appeal was pending, his life sentence was vacated and the case was remanded so the trial court could consider the Miller factors before determining sentence. *Parker v. State*, 119 So. 3d 987 (Miss. 2013).

**58. —Where underlying offense is robbery.**

Conviction for capital murder with the underlying felony of robbery was appropriate because the jury received proper instruction on the elements of capital murder and on the one-continuous-transaction rule. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

**59. Manslaughter instruction given where evidence sufficient for murder.**

Circuit court did not err in giving an instruction to the jury which simply tracked the language found in cases regarding heat-of-passion manslaughter. *Bradshaw v. State*, — So. 3d —, 2013 Miss. App. LEXIS 858 (Miss. Ct. App. Dec. 10, 2013).

**71. Instructions properly denied.**

Trial court properly declined to give a circumstantial evidence instruction in a case in which defendant was convicted of capital murder for killing the victim while in the commission of a robbery because the armed robbery was an essential element of the charge and was proved through direct evidence, eliminating any need for a circumstantial evidence instruction. *Carson v. State*, 125 So. 3d 104 (Miss. Ct. App. 2013).

#### 1. Validity.

Based on *Miller v. Alabama*, 132 S. Ct. 2445 (2012), *Parker v. State*, 119 So. 3d 987 (Miss. 2013), and *ones v. State*, 122 So. 3d 698 (Miss. 2013), an inmate who was 17 years old at the time he was involved in the robbery that led to his capital murder guilty plea and a sentence of life in prison without eligibility for parole was entitled to a new sentencing hearing to consider a sentence that would allow parole. *Thomas v. State*, — So. 3d —, 2014 Miss. App. LEXIS 16 (Miss. Ct. App. Jan. 14, 2014).



**§ 97-3-25. Homicide; killing of child under 18 years of age by perpetrator over 21 years of age; penalties for manslaughter and child homicide.**

**JUDICIAL DECISIONS**

**5. Enhancement.**

Trial court erred in enhancing defendant's sentence for using a firearm during the commission of a felony because the jury did not specifically find defendant guilty of using a firearm in the commission of the crime of manslaughter; be-

cause the fact that defendant used a firearm during the commission of the felony crime of manslaughter could be inferred only from the evidence, not the jury's findings, the trial court was not permitted to enhance defendant's sentence. *Waits v. State*, 119 So. 3d 1024 (Miss. 2013).

**§ 97-3-35. Homicide; killing without malice in the heat of passion.**

**JUDICIAL DECISIONS**

6. Evidence; generally.
7. — Warranting manslaughter.
- 7.5 — Not warranting manslaughter.
9. Instructions; generally.
10. — Warrantableness of manslaughter instructions.
11. — — Where evidence justifies murder conviction.

**6. Evidence; generally.**

**7. — Warranting manslaughter.**

There was sufficient evidence to convict defendant of manslaughter in violation of Miss. Code Ann. § 97-3-35 because the State put on evidence tending to show that defendant had a deliberate design to kill the victim, and there was corroborated testimony that the victim was neither confronting nor threatening defendant at the time he was shot; the only weapon found on the premises was defendant's handgun. *Vaughn v. State*, 111 So. 3d 1289 (Miss. Ct. App. 2013).

**7.5 — Not warranting manslaughter.**

Evidence was sufficient and the weight of the evidence supporting the verdict finding defendant guilty of murder was substantial because the eyewitnesses maintained that defendant walked up behind the victim, unprovoked, and shot him in the back; the victim was unarmed; there was no case for self-defense; defendant was not in a heightened emotional

state; and, regarding the previous alleged acts of violence by the victim against defendant, a two-month cooling off period could not be considered an immediate act of provocation for manslaughter. *Day v. State*, 126 So. 3d 1011 (Miss. Ct. App. 2013).

Weight and sufficiency of the evidence supported defendant's conviction for deliberate-design murder, as the evidence showed that he had retrieved a gun after a confrontation with the victim had ended, returned to the scene, and then shot the victim multiple times, even after the victim was lying in the street; the evidence did not support a verdict for manslaughter based on heat of passion, and did not support defendant's claim of self-defense. *Davis v. State*, — So. 3d —, 2013 Miss. App. LEXIS 490 (Miss. Ct. App. Aug. 13, 2013), writ of certiorari denied by 2014 Miss. LEXIS 73 (Miss. Jan. 30, 2014).

**9. Instructions; generally.**

**10. — Warrantableness of manslaughter instructions.**

In defendant's murder trial, although his claim that the trial judge erred in failing to sua sponte craft a separate heat-of-passion manslaughter instruction was barred due to waiver, it also lacked merit because the jury was instructed in that regard, such that there was no manifest



injustice. *Davis v. State*, — So. 3d —, 2013 Miss. App. LEXIS 490 (Miss. Ct. App. Aug. 13, 2013), writ of certiorari denied by 2014 Miss. LEXIS 73 (Miss. Jan. 30, 2014).

**11. — — Where evidence justifies murder conviction.**

Defendant, who was convicted of capital murder with the underlying felony of rob-

bery, was not entitled to a manslaughter instruction because there was no evidentiary basis for an imperfect-self-defense, fighting words, or depraved heart murder theory. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

**§ 97-3-47. Homicide; all other killings.**

**JUDICIAL DECISIONS**

**9. Indictment.**

To the extent they conflict with the ruling that a manslaughter indictment that asserts wilful killing is fatally flawed, the Mississippi Supreme Court overrules *Williams v. State*, 161 Miss. 406, 137 So. 106 (1931) and *Yazzie v. State*, 366 So. 2d 240 (Miss. 1979). *State v. Buckhalter*, 119 So. 3d 1015 (Miss. 2013).

Defendant's indictment for manslaughter was properly dismissed because it was fatally flawed. Language in the indictment that defendant "willfully" caused the death of her unborn child stated conduct that was addressed in other Miss. Code Ann. tit. 97 statutes, rendering the manslaughter statute inapplicable. *State v. Buckhalter*, 119 So. 3d 1015 (Miss. 2013).

**§ 97-3-53. Kidnapping; punishment.**

**JUDICIAL DECISIONS**

**I. UNDER CURRENT LAW.**

**3. Evidence.**

**I. UNDER CURRENT LAW.**

**3. Evidence.**

There was sufficient evidence to convict defendant of kidnapping and the verdict was not against the overwhelming weight of the evidence because the victim testified that on the day of the incident, when she tried to leave the neighbor's home

after realizing that no one was inside, defendant locked the door, grabbed her by her arm, and told her that she was not going anywhere; and the evidence that the doors to the neighbor's house would have been locked, as no one was home, and that the incident could not have occurred did not point in defendant's favor with such force that reasonable men could not have found without a reasonable doubt that he was guilty of kidnapping. *Sims v. State*, 127 So. 3d 307 (Miss. Ct. App. 2013).

**§ 97-3-65. Statutory rape; enhanced penalty for forcible sexual intercourse or statutory rape by administering certain substances.**

**JUDICIAL DECISIONS**

**I. IN GENERAL.**

**1. In general.**

**II. EVIDENTIARY MATTERS.**

**19. Sufficiency of evidence; generally.**

**I. IN GENERAL.**

**1. In general.**

Sexual intercourse between an underage child and an adult clearly is a crime of violence for purposes of the habitual of-

fender statute, as sexual intercourse cannot occur without the exertion of some degree of physical force, even if it entails no pain or bodily harm and leaves no mark. *Taylor v. State*, 122 So. 3d 707 (Miss. 2013).

## II. EVIDENTIARY MATTERS.

### 19. Sufficiency of evidence; generally.

Evidence was sufficient to convict defendant of statutory-rape and sexual battery

and the verdicts were not against the overwhelming weight of the evidence because the victim, who was not defendant's wife, was 14 years of age, and defendant was 26 years of age at the time of the October incident; the victim testified that defendant inserted his private organ into her rectum; and the absence of physical evidence did not negate his conviction as there was testimonial evidence. *Sims v. State*, 127 So. 3d 307 (Miss. Ct. App. 2013).

## § 97-3-73. Robbery; definition.

### JUDICIAL DECISIONS

2. Indictment.
3. Evidence.
4. Instructions.

#### 2. Indictment.

No prejudice resulted to the defense because the jury instructions given by the trial court properly related the robbery charge to the testimony and evidence presented to the jury for their deliberations. Moreover, the record failed to reflect any evidence of variation between the elements and the factual proof in support of each element of the robbery charge. *Faust v. State*, 113 So. 3d 614 (Miss. Ct. App. 2013).

#### 3. Evidence.

Evidence supported defendant's conviction for robbery, under Miss. Code Ann. § 97-3-73, because (1) the victim testified that defendant used force and violence against her to take possession of her mother's pickup truck; (2) the victim identified defendant as the person who took the truck from her control; (3) a deputy testified that, at the time of defendant's arrest, the truck was stopped in the middle of the road, rather than neatly

parked at a library as defendant claimed; and (4) two deputies identified defendant as the person removed from the allegedly stolen truck. *Faust v. State*, 113 So. 3d 614 (Miss. Ct. App. 2013).

Evidence supported defendant's conviction for capital murder with the underlying felony of robbery because defendant stated in a confession that defendant killed the victim during a fight, left the apartment for approximately an hour and a half, and then returned and began a clean-up effort when defendant was discovered by a sheriff's deputy. Other evidence showed that defendant used the victim's cash and credit card to purchase cleaning supplies with which to conceal the crime. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

#### 4. Instructions.

Conviction for capital murder with the underlying felony of robbery was appropriate because the jury received proper instruction on the elements of capital murder and on the one-continuous-transaction rule. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

## § 97-3-79. Robbery; use of deadly weapon.

### JUDICIAL DECISIONS

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>2. Construction and application; generally.</li> <li>6. —Property subject to robbery.</li> </ol> | <ol style="list-style-type: none"> <li>7. Indictment.</li> <li>12. Sufficiency of evidence; generally.</li> <li>20. Sentence.</li> </ol> |
|---|--|



21. Miscellaneous.

**2. Construction and application; generally.**

**6. —Property subject to robbery.**

When a person takes property in which he himself maintains title, but which is legally in the possession of the victim, by force or threat of force by exhibition of a deadly weapon, the armed-robbery statute, Miss. Code Ann. § 97-3-79, applies. *Veazy v. State*, 113 So. 3d 1226 (Miss. 2013).

Defendants were properly convicted of armed robbery for taking a car from the victim's repair shop at gunpoint; although one defendant had legal title to the car, the victim had the right of possession of the car through his mechanic's lien under Miss. Code Ann. § 85-7-107. *Veazy v. State*, 113 So. 3d 1226 (Miss. 2013).

**7. Indictment.**

Indictment charging defendant juvenile with capital murder was not defective, even though it referenced this section and did not provide the essential elements of the underlying crime of robbery, since it put defendant on notice that he was being charged with capital murder based on a robbery and defendant was aware that the charged underlying felony was robbery and not armed robbery. *Hye v. State*, — So. 3d —, 2013 Miss. App. LEXIS 292 (Miss. Ct. App. May 28, 2013).

**12. Sufficiency of evidence; generally.**

Evidence was sufficient to establish the elements of armed robber beyond a reasonable doubt because defendant failed to show how a DNA analysis would aid his defense in any way, and both victims identified defendant as one of the two men who robbed them; in addition to the in-court identifications, on the night of the robbery, both victims identified defendant from a photo array as one of the robbers. *Lewis v. State*, 112 So. 3d 1092 (Miss. Ct. App. 2013).

Verdict convicting defendant of armed robbery was not contrary to the over-

whelming weight of the evidence because a co-conspirator's testimony was corroborated in part by three witnesses; the testimony was not inherently unreliable or substantially impeached because a large part of it was corroborated by other evidence or testimony. *Foster v. State*, — So. 3d —, 2013 Miss. App. LEXIS 135 (Miss. Ct. App. Mar. 26, 2013).

Evidence was sufficient to convict defendant of aggravated assault and armed robbery and the verdicts were not against the weight of the evidence as he was present, consenting, aiding, and abetting the commission of the robbery by one of the accomplices, and the two accomplices' testimony was more than slightly supported by corroborating eyewitness testimony and forensic evidence. *Grossley v. State*, 127 So. 3d 1143 (Miss. Ct. App. 2013), writ of certiorari denied by 2014 Miss. LEXIS 26 (Miss. Jan. 9, 2014).

**20. Sentence.**

Circuit court did not err in sentencing defendant to forty years in prison for armed robbery in violation of Miss. Code Ann. § 97-3-79 because when the circuit judge announced the sentence, it simultaneously gave defendant credit for all of his pretrial custody time pursuant to Miss. Code Ann. § 99-19-23, which ultimately shortened defendant's announced sentence to under forty years. *Foster v. State*, — So. 3d —, 2013 Miss. App. LEXIS 135 (Miss. Ct. App. Mar. 26, 2013).

**21. Miscellaneous.**

Defendant was properly convicted of armed robbery because the evidence supported the jury's finding that defendant was the man who robbed a bank despite misinformation regarding the robber's color, the search of defendant's house and seizure of a gun fell within the Fourth Amendment's protective-sweep exception, and the trial court properly refused defendant's insanity-defense instruction. *Hutto v. State*, 114 So. 3d 802 (Miss. Ct. App. 2013).



## § 97-3-95. Sexual battery.

## JUDICIAL DECISIONS

6. Indictment.
7. Evidence; generally; admissibility.
9. — Sufficiency.
10. —Other; miscellaneous.
11. Practice and procedure; jury instructions.
12. Sentence.
13. Other, miscellaneous.
14. Lesser included offenses.

**6. Indictment.**

Even if defendant had timely objected to the indictment alleging the expiration of the statute of limitations for the first two years of the indictment's time span, the circuit court's solution would have been to amend the indictment to reflect a time period not in conflict with any alleged statute-of-limitations issues, which was essentially done when defense counsel requested and was granted jury instructions that limited the time span for the offenses to 15 months that were within the statute of limitations. *Hines v. State*, 126 So. 3d 985 (Miss. Ct. App. 2013).

In a case where defendant was convicted of statutory rape and of sexual battery of a child, although the indictment listed a four-year time span in which the offenses occurred, because defense counsel requested and was granted jury instructions limiting that time span to 15-months during which defendant was in contact with the children, the 15-month time span in which the offenses allegedly occurred was not unreasonably large for defendant to be on notice as to the crimes charged and was not unreasonably large so as to prevent defendant from defending himself. *Hines v. State*, 126 So. 3d 985 (Miss. Ct. App. 2013).

Defendant's indictment was sufficient even though the sexual-battery counts initially tracked the wrong subsection of the sexual battery statute because the indictment specifically alleged that defendant abused his fourteen-year-old daughter and included his birthday, the daughter's birthday, and the dates of the alleged crimes; the amendment to the indictment to reflect the appropriate subsection was

one of form. *Weeks v. State*, 123 So. 3d 373 (Miss. 2013).

**7. Evidence; generally; admissibility.****9. — Sufficiency.**

Evidence was sufficient to convict defendant of statutory-rape and sexual battery and the verdicts were not against the overwhelming weight of the evidence because the victim, who was not defendant's wife, was 14 years of age, and defendant was 26 years of age at the time of the October incident; the victim testified that defendant inserted his private organ into her rectum; and the absence of physical evidence did not negate his conviction as there was testimonial evidence. *Sims v. State*, 127 So. 3d 307 (Miss. Ct. App. 2013).

Evidence was sufficient to sustain defendant's convictions for statutory rape and sexual battery of a child and the overwhelming weight of the evidence was not contrary to the verdicts because the victims both testified that they visited defendant during the time span in which the offenses occurred, the victims both testified in detail regarding the sexual abuse, and the victims' mother testified regarding the victims' visitation with defendant. *Hines v. State*, 126 So. 3d 985 (Miss. Ct. App. 2013).

Evidence was sufficient to support defendant's conviction for sexual battery by one in a position of authority over a child under the age of eighteen years old because the victim testified that defendant, the victim's grandparent, sexually abused the victim, who was under 18 years of age, when the victim was living in defendant's home and the victim's sole parent was away at the time. Moreover, defendant gave a statement to the police of having sexually abused the victim. *Gill v. State*, 126 So. 3d 128 (Miss. Ct. App. 2013).

Jury's verdict finding defendant guilty of sexual battery upon his fourteen-year-old daughter was sufficiently supported by the evidence and not against the overwhelming weight of the evidence because

the victim testified that defendant had touched her vagina several times between June 2010 and September 2010 with his hands, mouth, penis, and a vibrator; and DNA evidence inside and outside the victim's vagina did not eliminate defendant as a potential source. *Weeks v. State*, 123 So. 3d 373 (Miss. 2013).

There was substantial evidence to support defendant conviction of sexual battery as alleged in the indictment because the State's burden was met; the child demonstrated each act through hand gestures while on the witness stand, and a forensic interviewer and a detective offered corroborating testimony that the child described the incidents during interviews. *Jones v. State*, — So. 3d —, 2013 Miss. App. LEXIS 477 (Miss. Ct. App. Aug. 6, 2013).

Conviction of sexual battery of a mentally deficient person, Miss. Code Ann. § 97-3-95(1)(b), was affirmed because there was sufficient evidence that the victim suffered from a mental deficiency; among other things, the victim's special-education teacher and former mental-health therapist testified that the victim's IQ was 61 and that he was significantly cognitively disabled. Moreover, the testimony sufficiently showed that the victim's mental age was that of a young child. *Santos v. State*, 110 So. 3d 341 (Miss. Ct. App. 2013).

#### 10. —Other; miscellaneous.

In a sexual-battery case, the trial court did not err in allowing an employee of the Mississippi Department of Human Services to testify about the victim's statements to her because the victim was of tender years when she made the statement, as she was 12 years old; the victim's statements to the employee had substantial indicia of reliability; and the victim testified at trial. *Pickett v. State*, — So. 3d —, 2013 Miss. App. LEXIS 761 (Miss. Ct. App. Nov. 12, 2013).

In a sexual-battery case, the trial court incorrectly identified the evidence of the testimony of the victim's mother about what her son told her as hearsay because it was not admitted to prove the truth of the matter asserted, but, rather, it was admitted only to show why the victim's mother went to the back room where she

stated that she found the victim kneeling on the floor facing defendant, who had his pants and underwear pulled down around his knees. *Pickett v. State*, — So. 3d —, 2013 Miss. App. LEXIS 761 (Miss. Ct. App. Nov. 12, 2013).

In a sexual-battery case, the trial court did not abuse its discretion by accepting the licensed clinical social worker as an expert witness and allowing her to testify that she diagnosed the victim with post-traumatic stress disorder based on information gathered from the victim though an interview because the Daubert factor of being able to test an expert witness's opinion for reliability did not apply. *Pickett v. State*, — So. 3d —, 2013 Miss. App. LEXIS 761 (Miss. Ct. App. Nov. 12, 2013).

In a case of sexual battery of a victim under the age of 14, the trial court was not required conduct a preliminary interrogation of the four-year-old child to determine competency, and defendant did not show that the trial court erred in allowing her to testify. *Graham v. State*, 120 So. 3d 1038 (Miss. Ct. App. 2013).

Defendant's written confession to penetration of his six-year-old niece in violation of Miss. Code Ann. § 97-3-95(1)(d) was properly admitted because his case was in the investigatory stage, not the accusatory stage; moreover, the trial court found that his confession was not coerced by the promise of a six-month to one-year sentence. *Petty v. State*, 118 So. 3d 659 (Miss. Ct. App. 2013).

#### 11. Practice and procedure; jury instructions.

Jury instruction submitted to the jury fairly stated the law of the case, and did not create an injustice, because the instruction followed the language of Miss. Code Ann. § 97-3-95 and clearly asked the jury to determine whether defendant was in a position of trust or authority at the time when defendant was alleged to have sexually abused the victim. *Gill v. State*, 126 So. 3d 128 (Miss. Ct. App. 2013).

Giving of a jury instruction did not constitute error by allowing the jury to convict defendant on a boarder definition of sexual battery than the crime alleged in the indictment because the jury was fairly and adequately instructed, and defendant was clearly convicted of the crime for



which he was charged in the indictment; the disputed language in the instruction did not substantially alter the elements of proof necessary to find defendant guilty. *Jones v. State*, — So. 3d —, 2013 Miss. App. LEXIS 477 (Miss. Ct. App. Aug. 6, 2013).

Trial court's failure to include in a jury instruction the element of sexual battery that defendant was twenty-four or more months older than the child was not prejudicial and did not amount to plain error because that element was listed in the indictment; therefore, defendant was given sufficient notice and had a reasonable opportunity to prepare and present a defense to that element, but he did not do so. *Jones v. State*, — So. 3d —, 2013 Miss. App. LEXIS 477 (Miss. Ct. App. Aug. 6, 2013).

Trial court did not err in failing to include in a jury instruction the element of sexual battery that defendant was twenty-four or more months older than the child because the absence of the element had no effect on the State's burden of proof, and the jury was properly instructed as to the State's burden; any fair-minded juror could have easily deduced that defendant, being twenty-eight years of age, was twenty-four or more months older than the child, who was eight years old. *Jones v. State*, — So. 3d —, 2013 Miss. App. LEXIS 477 (Miss. Ct. App. Aug. 6, 2013).

## 12. Sentence.

Defendant's sentence of thirty-five years in prison, with thirty years to serve

and five years suspended, followed by five years' supervised probation, without the possibility of parole, was permissible under Miss. Code Ann. § 47-7-3(1)(b), although Miss. Code Ann. § 97-3-101(3) did not expressly authorize day-for-day sentences and parole restrictions. *Petty v. State*, 118 So. 3d 659 (Miss. Ct. App. 2013).

## 13. Other, miscellaneous.

Trial court did not abuse its discretion in denying defendant a mistrial due to remarks the prosecutor made about other children being present in a house when an assault on the child victim occurred because defendant himself provided overwhelming evidence of his guilt in a statement in which he admitted that not only did the victim perform oral sex on defendant, but that defendant had performed anal sex on the victim. *Flowers v. State*, 119 So. 3d 1108 (Miss. Ct. App. 2013).

## 14. Lesser included offenses.

Trial court did not err by giving a lesser-included-offense jury instruction regarding fondling under the count charging defendant with sexual battery because ample evidence supported the lesser-included offense of fondling, and the intent element of fondling could be inferred from defendant's actions. *Jenkins v. State*, — So. 3d —, 2013 Miss. LEXIS 569 (Miss. Oct. 31, 2013).

# § 97-3-97. Sexual battery; definitions.

## JUDICIAL DECISIONS

2. Sexual penetration.
4. Jury Instructions.
5. Mentally defective person.

## 2. Sexual penetration.

Evidence was sufficient to convict defendant of statutory-rape and sexual battery and the verdicts were not against the

overwhelming weight of the evidence because the victim, who was not defendant's wife, was 14 years of age, and defendant was 26 years of age at the time of the October incident; the victim testified that defendant inserted his private organ into her rectum; and the absence of physical evidence did not negate his conviction as



there was testimonial evidence. *Sims v. State*, 127 So. 3d 307 (Miss. Ct. App. 2013).

#### 4. Jury Instructions.

Giving of a jury instruction did not constitute error by allowing the jury to convict defendant on a boarder definition of sexual battery than the crime alleged in the indictment because the jury was fairly and adequately instructed, and defendant was clearly convicted of the crime for which he was charged in the indictment; the disputed language in the instruction did not substantially alter the elements of proof necessary to find defendant guilty. *Jones v. State*, — So. 3d —, 2013 Miss.

App. LEXIS 477 (Miss. Ct. App. Aug. 6, 2013).

#### 5. Mentally defective person.

Conviction of sexual battery of a mentally deficient person, Miss. Code Ann. § 97-3-95(1)(b), was affirmed because there was sufficient evidence that the victim suffered from a mental deficiency; among other things, the victim's special-education teacher and former mental-health therapist testified that the victim's IQ was 61 and that he was significantly cognitively disabled. Moreover, the testimony sufficiently showed that the victim's mental age was that of a young child. *Santos v. State*, 110 So. 3d 341 (Miss. Ct. App. 2013).

### § 97-3-101. Sexual battery; penalty.

#### JUDICIAL DECISIONS

#### 2. Sentence ranges.

Defendant's sentence of thirty-five years in prison, with thirty years to serve and five years suspended, followed by five years' supervised probation, without the possibility of parole, was permissible un-

der Miss. Code Ann. § 47-7-3(1)(b), although Miss. Code Ann. § 97-3-101(3) did not expressly authorize day-for-day sentences and parole restrictions. *Petty v. State*, 118 So. 3d 659 (Miss. Ct. App. 2013).

### § 97-3-117. Mississippi Carjacking Act; what constitutes offense of carjacking; attempted carjacking; armed carjacking; penalties.

#### JUDICIAL DECISIONS

#### 5. Sentence.

Defendant's act of carjacking per se involved conduct that presented a serious potential risk of physical violence to another, and therefore any conviction for

carjacking constituted a felony involving the use or threat of violence to the person for purposes of aggravating circumstances in a death penalty case. *Galloway v. State*, 122 So. 3d 614 (Miss. 2013).

## CHAPTER 5

## Offenses Affecting Children

**§ 97-5-23. Touching, handling, etc., child, mentally defective or incapacitated person or physically helpless person.**

## JUDICIAL DECISIONS

3. Evidence.
7. Jury instructions.

**3. Evidence.**

Evidence was sufficient to convict defendant of gratification of lust and the verdict was not against the overwhelming weight of the evidence because defendant was 26 years old at the time of the December incident, and the victim was 14 years old; defendant forced the victim to touch his privates; and the victim's brother corroborated the victim's testimony that defendant forced her to touch defendant's privates. *Sims v. State*, 127 So. 3d 307 (Miss. Ct. App. 2013).

Trial court did not err in denying defendant's motion for a new trial because the evidence was such that allowing the verdict to stand would not sanction an unconscionable justice; several witnesses, including the victim, testified to the elements of fondling, while defendant called no witnesses of his own and pointed to no evidence in the record that preponderated heavily against the verdict. *Jenkins v. State*, — So. 3d —, 2013 Miss. LEXIS 569 (Miss. Oct. 31, 2013).

Trial court did not err in denying defendant's motions for directed verdict and judgment notwithstanding the verdict because the victim's testimony was sufficient to establish the elements of fondling beyond a reasonable doubt; the victim's therapist testified that the victim's conduct was consistent with one who was the victim of a sex crime, and the victim gave consistent statements to her stepmother, a deputy sheriff, and a nurse, who each testified to her description of the abuse. *Jenkins v. State*, — So. 3d —, 2013 Miss. LEXIS 569 (Miss. Oct. 31, 2013).

Jury's verdict finding defendant guilty of child fondling of his fourteen-year-old daughter was sufficiently supported by

the evidence and not against the overwhelming weight of the evidence because the victim testified that defendant had touched her vagina several times between June 2010 and September 2010 with his hands, mouth, penis, and a vibrator, and DNA evidence inside and outside the victim's vagina did not eliminate defendant as a potential source. *Weeks v. State*, 123 So. 3d 373 (Miss. 2013).

Evidence was sufficient to sustain defendant's conviction for touching a child for lustful purposes because an expert opined that the child's examination was consistent with a child who had suffered "an inappropriate act," and the child stated at trial that defendant had never gone more than a year without touching her inappropriately. *Bateman v. State*, 125 So. 3d 616 (Miss. 2013).

Victim's testimony that she believed defendant to be 42 years old at the time of the crime was sufficient to prove that defendant was over the age of 18. *Campbell v. State*, 125 So. 3d 46 (Miss. 2013).

Evidence that the victim believed that defendant was her foster father, she lived with defendant and his wife for several months, she had her own bedroom in defendant's residence, she went on family vacations with defendant and his wife, and defendant and his wife imposed rules on the victim was sufficient for the jury to conclude that defendant, while not the victim's license foster parent, was in a position of trust or authority over the victim. *Campbell v. State*, 125 So. 3d 46 (Miss. 2013).

Victim's testimony that defendant put his penis in her hand, it was wet, and she wiped it on her mattress, and that defendant's semen was recovered from the mattress was sufficient to support defendant's conviction for touching a child for lustful purposes. *Gerhold v. State*, 127 So. 3d

1116 (Miss. Ct. App. 2013), writ of certiorari denied by 2014 Miss. LEXIS 17 (Miss. Jan. 9, 2014).

Defendant's conviction of fondling was affirmed, as the jury's acceptance of the complainant's testimony over defendant's testimony was not against the overwhelming weight of the evidence so as to sanction an unconscionable injustice. *Fortune v. State*, 110 So. 3d 831 (Miss. Ct. App. 2013).

#### **7. Jury instructions.**

Trial court did not err by giving a lesser-included-offense jury instruction regarding fondling under the count charging defendant with sexual battery because

ample evidence supported the lesser-included offense of fondling, and the intent element of fondling could be inferred from defendant's actions. *Jenkins v. State*, — So. 3d —, 2013 Miss. LEXIS 569 (Miss. Oct. 31, 2013).

Where defendant claimed his medication rendered him unconscious of his alleged fondling of a child, the trial court did not err in refusing his instruction on "legal unconsciousness due to involuntary intoxication," as it charged the jury on the requisite mens rea and gave defendant the opportunity to present his defense that any inappropriate act was due to effects of the medication. *Fortune v. State*, 110 So. 3d 831 (Miss. Ct. App. 2013).

### **§ 97-5-33. Exploitation of children; prohibitions.**

#### **JUDICIAL DECISIONS**

#### **5. Evidence.**

Sufficient evidence supported defendant's conviction for enticement of a child for sexual purposes, Miss. Code Ann. § 97-5-33(6), even though an overt request for sexual activity was not made in defendant's letter to the victim, because a

jury could find that a request by a middle aged man to "visit" with an underage boy in a hotel room, against his parents' wishes, satisfactorily met the elements of the crime charged. *Westbrook v. State*, 109 So. 3d 609 (Miss. Ct. App. 2013).

### **§ 97-5-39. Contributing to the neglect or delinquency of a child; felonious abuse and/or battery of a child.**

#### **JUDICIAL DECISIONS**

#### **I. UNDER CURRENT LAW.**

4. Evidence.
7. Jury instructions.

#### **I. UNDER CURRENT LAW.**

#### **4. Evidence.**

Defendant was not entitled to a new trial as the verdict finding him guilty of felonious child abuse was not against the weight of the evidence because the doctor who treated the child stated that the burns were not on her dominant fingers and that they were from a solid, hot surface; and defendant's explanations for the child's burned fingers were numerous, contradictory, and inconsistent with the medical testimony. *Harris v. State*, 123 So. 3d 925 (Miss. Ct. App. 2013).

Evidence supported defendant's child abuse conviction because (1) members of defendant's family testified that defendant was alone in a bathroom with defendant's sixteen-month-old child; (2) the family members heard running bath water and defendant spanking the child with a belt; (3) the child suffered a bruise below one eye; (4) a family member said the bath water was steaming hot; and (5) an emergency-room physician testified that the child suffered severe hot-water burns to the lower body. *Williams v. State*, 122 So. 3d 105 (Miss. Ct. App. 2013).

#### **7. Jury instructions.**

In a felonious child abuse case, because the child's burns were not caused by a child exploring her environment, the doc-



tor who treated her unequivocal opined that the burns were nonaccidental, the burns came from a hot, solid object, and no reasonable juror could find the child's second-degree burns on nondominant fingers were not considered serious bodily harm, the trial court did not err in refusing to instruct the jury on the lesser-offense of simple assault. *Harris v. State*, 123 So. 3d 925 (Miss. Ct. App. 2013).

In a felonious child abuse case, because the medical evidence showed that the

burns to the child's fingers were second-degree burns, which could not be classified as anything other than serious bodily harm regardless of their cause, no reasonable jury could find defendant guilty of merely misdemeanor child abuse; thus, there was no evidentiary basis for a lesser-included instruction on misdemeanor child abuse. *Harris v. State*, 123 So. 3d 925 (Miss. Ct. App. 2013).

## CHAPTER 9

### Offenses Affecting Administration of Justice

#### ARTICLE 1.

#### IN GENERAL.

### § 97-9-49. Escape of prisoners; penalties for convicts in jail and persons under arrest or custody; willful failure to return to jail after being entrusted to leave.

#### JUDICIAL DECISIONS

##### 1.5. Indictment sufficient.

Defendant was adequately informed by the indictment of the nature of the felony escape charge against defendant and the supporting facts because the indictment stated that defendant willfully, unlaw-

fully, and feloniously escaped by force from the custody of a county sheriff's department, pursuant to lawful process or arrest, in violation of Miss. Code Ann. § 97-9-49. *Jackson v. State*, 121 So. 3d 313 (Miss. Ct. App. 2013).

### § 97-9-72. Fleeing or eluding a law enforcement officer in a motor vehicle; felonies; sanctions; defenses.

#### JUDICIAL DECISIONS

1. Evidence.
3. Jury instruction.

##### 1. Evidence.

Evidence was sufficient to support defendant's conviction for felonious evasion because defendant, when a sheriff's deputy mentioned using a drug-detection dog to sniff around defendant's car while questioning defendant about drugs during a valid traffic stop, jumped into defendant's car and sped away at high speed, despite being shot with a taser, and fled on foot after defendant flipped the car. Wil-

liams v. State, 126 So. 3d 85 (Miss. Ct. App. 2013).

Following evidence was sufficient to convict defendant of felony eluding: 1) a witness called police to report that a man was in her home and described him and his car; 2) an officer chased a car matching that description; 3) at the end of the chase, the driver exited the vehicle and ran into a house; 3) defendant was found hiding in the house; and 4) the witness who had called police identified defendant at trial as the intruder. *Conner v. State*, — So. 3d

—, 2013 Miss. App. LEXIS 226 (Miss. Ct. App. Apr. 30, 2013).

### 3. Jury instruction.

Trial court did not err by giving a flight instruction because there was no independent reason or basis for defendant's flight and the evidence that defendant flipped a car and then fled on foot before law en-

forcement arrived was probative of both whether defendant was purposefully evading pursuing officers and whether, in doing so, defendant was driving recklessly. Because of the probative value of this evidence, neither the evidence, nor the related instruction violated Miss. R. Evid. 403. *Williams v. State*, 126 So. 3d 85 (Miss. Ct. App. 2013).

## § 97-9-73. Resisting or obstructing arrest; fleeing or eluding law enforcement officer in motor vehicle.

### JUDICIAL DECISIONS

#### 1. In general.

Because, in attempting to prove assault, the State introduced evidence that defendant began swinging at an officer while he was being arrested, and it would have been impossible for defendant to have committed simple assault on a law enforcement officer without committing the

crime of resisting arrest, the offense of resisting arrest was a lesser-included offense of the charged crime of simple assault, and the trial judge was authorized to grant the State's request for a resisting-arrest instruction. *Edwards v. State*, 124 So. 3d 105 (Miss. Ct. App. 2013).

### ARTICLE 3.

### OBSTRUCTION OF JUSTICE.

## § 97-9-127. Retaliation against a public servant or witness.

### JUDICIAL DECISIONS

1.-2. [Reserved for future use.]

3. Indictment sufficient.

4. Weight of the evidence.

5. Jury instructions.

1.-2. [Reserved for future use.]

#### 3. Indictment sufficient.

Indictment clearly contained the elements of the retaliation and sufficiently informed defendant of the charge against him because it charged that he unlawfully threatened a police officer by threatening to assault the officer; the act of threatening to harm a police officer in the future is unlawful. *Young v. State*, 119 So. 3d 309 (Miss. 2013).

#### 4. Weight of the evidence.

Verdict finding defendant guilty of retaliation was not so contrary to the evi-

dence that to let it stand would sanction an unconscionable injustice, and the evidence did not weigh heavily against the jury's verdict, because defendant threatened to harm an officer by threatening to assault the officer. *Young v. State*, 119 So. 3d 309 (Miss. 2013).

#### 5. Jury instructions.

Trial court sufficiently instructed the jury on retaliation because its instruction clearly required the State to prove beyond a reasonable doubt that defendant did unlawfully threaten to harm the officer by threatening to assault and/or kill him. *Young v. State*, 119 So. 3d 309 (Miss. 2013).

## CHAPTER 17

## Crimes Against Property

## IN GENERAL

**§ 97-17-1. Arson; first degree; burning dwelling house or out-building.**

## JUDICIAL DECISIONS

**7. Evidence.**

Rational jury could have concluded from defendant's financial situation and the strong evidence supporting her prior commission of insurance fraud that defendant had the motive to burn down her house and recover the insurance proceeds. *Dees v. State*, 126 So. 3d 21 (Miss. 2013).

Circumstantial evidence presented by the State was sufficient to sustain defen-

dant's arson conviction; reasonable jurors could have rejected a defense expert's testimony in favor of the testimony of the State's witnesses and found beyond a reasonable doubt that the fire to defendant's home did not have an electrical cause and was incendiary. *Dees v. State*, 126 So. 3d 21 (Miss. 2013).

**§ 97-17-23. Burglary; breaking and entering inhabited dwelling; home invasion.**

## JUDICIAL DECISIONS

2. Sufficiency of evidence.

4.5. Jury instructions.

**2. Sufficiency of evidence.**

Evidence was sufficient to convict defendant of burglary because, while two witnesses who testified as to defendant's involvement with them in the burglary could not establish where the burglary occurred, evidence regarding items taken made it reasonable for the jury to infer that the apartment defendant and the others burglarized was the victim's apartment. *Terry v. State*, 126 So. 3d 946 (Miss. Ct. App. 2013).

Evidence was sufficient to convict defendant of burglary and the verdict was not against the overwhelming weight of the evidence because, even if jury believed that defendant did not personally go into victim's apartment, he was an accomplice as he supplied one of the guns used in the robbery and provided a place to hide the stolen items. *Gardner v. State*, 121 So. 3d 309 (Miss. Ct. App. 2013).

Testimony from the victim, police detectives, and an eyewitness who had identified defendant as the person who broke into the victim's house and stole a television, was sufficient to convict defendant of burglary of a dwelling, and defendant's conviction was not against the overwhelming weight of the evidence. *Luster v. State*, — So. 3d —, 2013 Miss. App. LEXIS 460 (Miss. Ct. App. July 30, 2013).

Although the victim of a burglary incorrectly described the perpetrator as approximately 18 years old, the evidence was sufficient for a jury to determine beyond a reasonable doubt that defendant was the person who committed the crime as the victim had sufficient time to observe defendant, she picked defendant out of a photo lineup, and when defendant was arrested, he had the same gold teeth the victim noted in her description of the perpetrator to the authorities. *Bell v. State*, 125 So. 3d 75 (Miss. Ct. App. 2013), writ of certiorari denied by 123 So. 3d 450, 2013 Miss. LEXIS 563 (Miss. 2013).



Victim's testimony that at the time she discovered defendant in her boyfriend's apartment, that the front door was locked, that there was evidence of forced entry through the apartment's window and that defendant was holding the victim's wallet when discovered, was sufficient to support his conviction and the denial of his motion for directed verdict and for judgment notwithstanding the verdict. *Bell v. State*, 125 So. 3d 75 (Miss. Ct. App. 2013), writ of certiorari denied by 123 So. 3d 450, 2013 Miss. LEXIS 563 (Miss. 2013).

Victim's eyewitness testimony that defendant entered her dwelling without her knowledge or permission was sufficient to identify defendant as the person who was in her home and was sufficient to convict him of burglary of a dwelling. *Conner v. State*, — So. 3d —, 2013 Miss. App. LEXIS 226 (Miss. Ct. App. Apr. 30, 2013).

#### 4.5. Jury instructions.

Trial judge incorrectly instructed the jury that breaking the plane of a door

satisfied the force element of burglary of a dwelling because there was no act or force employed to effect an entrance when defendant merely walked through a raised, open garage door to take the victim's purse from her car. *Watson v. State*, 123 So. 3d 446 (Miss. 2013).

Where an indictment charging defendant with burglary in violation of Miss. Code Ann. § 97-17-23(1) alleged he entered a dwelling with the intent to commit larceny therein, as he did not request a jury instruction on the elements of larceny, and those elements were not elements of the crime of burglary, the trial court did not plainly err by not giving such an instruction. *Conner v. State*, — So. 3d —, 2013 Miss. App. LEXIS 226 (Miss. Ct. App. Apr. 30, 2013).

### § 97-17-33. Burglary; breaking and entering building other than dwelling; railroad car; vessels; automobiles.

#### JUDICIAL DECISIONS

#### 6. Evidence, generally.

Trial court did not err in denying defendant's motions for a directed verdict and a judgment notwithstanding the verdict for the offense of burglary of a business because the jury was presented with video surveillance depicting a man carrying the stolen bottles to the trunk of his vehicle using what appeared to be a bedspread or sheet; defendant's girlfriend described how defendant took the bedspread off the hotel bed and went outside of the hotel room, and then the following day, she observed many unopened bottles of alcohol in the trunk of his car; and an officer testified that defendant's vehicle matched the vehicle seen in the surveillance video.

*Stewart v. State*, — So. 3d —, 2013 Miss. App. LEXIS 600 (Miss. Ct. App. Sept. 17, 2013).

Evidence supported defendant's multiple convictions of automobile burglary because video-surveillance footage showed his truck parked next to or near the victims' vehicles and defendant illegally entering those vehicles and the victims described the damage to their vehicles and the items taken from their vehicles. Additionally, a security officer observed a vehicle pull into a parking lot, defendant exit the vehicle, and look in the windows of other vehicles, one of which was burglarized. *Bunch v. State*, 123 So. 3d 484 (Miss. Ct. App. 2013).

**§ 97-17-67. Malicious mischief.****JUDICIAL DECISIONS****1. In general.**

Evidence that defendant jumped on the hood of the victim's car and kicked the fender, causing \$ 729.12 in damages was

sufficient to support a malicious mischief conviction. *Shaw v. State*, — So. 3d —, 2013 Miss. App. LEXIS 662 (Miss. Ct. App. Oct. 8, 2013).

**§ 97-17-70. Receiving stolen property; dual charges of both stealing and receiving same property not to be brought against single defendant in same jurisdiction; penalties.****JUDICIAL DECISIONS****I. UNDER CURRENT LAW.**

2. Evidence.
3. Sufficiency of evidence.
4. Instructions.

**I. UNDER CURRENT LAW.****2. Evidence.**

Because defendant was found in possession of a stolen vehicle after attempting to conceal his identity from law enforcement, and he offered no explanation of how he came into possession of the vehicle, nor did he ever allege at trial that the vehicle was borrowed, the trial court's denial of defendant's motion for a new trial did not amount to an abuse of discretion as the verdict was not against the overwhelming weight of the evidence. *Kelly v. State*, 124 So. 3d 717 (Miss. Ct. App. 2013).

**3. Sufficiency of evidence.**

Evidence was sufficient to support defendant's conviction for possession of stolen property because he knew or should have known that the vehicle was stolen as he misrepresented to law enforcement his identity during a roadblock, and he was driving with an unregistered license plate. *Kelly v. State*, 124 So. 3d 717 (Miss. Ct. App. 2013).

**4. Instructions.**

Because defendant was in possession of the stolen vehicle and an eyewitness testified that defendant had possessed the vehicle for at least three to four months prior to his arrest, there was direct evidence of the crime of possession of stolen property presented, and the trial court properly refused to give a two-theory jury instruction. *Kelly v. State*, 124 So. 3d 717 (Miss. Ct. App. 2013).

**CHAPTER 19****False Pretenses and Cheats****§ 97-19-9. Credit cards; definitions.****JUDICIAL DECISIONS****1. Credit card.**

Evidence was sufficient to convict defendant of two counts of credit-card fraud after using a stolen debit card to purchase clothing from two stores because the store

employees testified that defendant signed receipts in both stores, as was customary in credit-card transactions; and, regardless of the chosen label, the fraudulently used card fell within the broad definition

of "credit card" in this statute. McClendon v. State, 124 So. 3d 709 (Miss. Ct. App. 2013).

**§ 97-19-21. Credit cards; use to obtain things of value or to operate automatic cash dispensing machines with intent to defraud; penalties.**

**JUDICIAL DECISIONS**

**1. Evidence.**

Evidence was sufficient to convict defendant of two counts of credit-card fraud after using a stolen debit card to purchase clothing from two stores because the store employees testified that defendant signed receipts in both stores, as was customary

in credit-card transactions; and, regardless of the chosen label, the fraudulently used card fell within the broad definition of "credit card" for purposes of the false pretenses and cheats crimes. McClendon v. State, 124 So. 3d 709 (Miss. Ct. App. 2013).

**CHAPTER 21**

**Forgery and Counterfeiting**

**ARTICLE 1.**

**GENERAL PROVISIONS.**

**§ 97-21-59. Uttering counterfeit instrument or coin.**

**JUDICIAL DECISIONS**

**3. Evidence.**

Where defendant testified that an employee gave him fifty dollars to cash a payroll check because the employee did not have the appropriate identification to cash the check, defendant's conviction for uttering a forgery was supported by sufficient evidence because an employer testified that he did not authorize anyone to

write the check to defendant and defendant's testimony that he empathized with the employee's situation and that he went to talk to the employer after hearing that the check was stolen did not sufficiently demonstrate defendant's lack of guilty knowledge and criminal intent. McGlasten v. State, 109 So. 3d 620 (Miss. Ct. App. 2013).



## CHAPTER 35

## Crimes Against Public Peace and Safety

**§ 97-35-7. Disorderly conduct; failure to comply with requests or commands of law enforcement officers; penalties; exception.**

## JUDICIAL DECISIONS

**2. Sufficiency of evidence.**

Evidence was sufficient to convict defendant of disorderly conduct and the verdict was not against the weight of the evidence because, although instructed by the officer to refrain from using his cell phone for the

safety of the officer and others at the scene, defendant continued to use his cell phone. *Matthews v. City of Madison*, — So. 3d —, 2013 Miss. App. LEXIS 611 (Miss. Ct. App. Sept. 17, 2013).

## CHAPTER 37

## Weapons and Explosives

## GENERAL PROVISIONS

**§ 97-37-5. Unlawful for convicted felon to possess any firearms, or other weapons or devices; penalties; exceptions.**

## JUDICIAL DECISIONS

**3.1. Sufficiency of Indictment.****6. Sufficient evidence.****9. Double jeopardy.****10. New trial.****3.1. Sufficiency of Indictment.**

Dismissal of an indictment charging defendant with being a felon in possession of a weapon and reversal of the conviction thereunder were required because the indictment failed to specify which, if any, of the four types of prohibited knives defendant was alleged to have possessed in violation of defendant's federal and state constitutional rights. *Thomas v. State*, 126 So. 3d 877 (Miss. 2013).

**6. Sufficient evidence.**

As defendant's counsel stipulated to the prior conviction for purposes of a charge against him of possession of a firearm by a convicted felon in order to avoid introduction of evidence that defendant had at least four prior felony convictions, the evidence was sufficient to support the pos-

session conviction. *Rogers v. State*, — So. 3d —, 2013 Miss. App. LEXIS 342 (Miss. Ct. App. June 11, 2013), writ of certiorari denied by 2014 Miss. LEXIS 58 (Miss. Jan. 23, 2014).

Appellant's suit against the State for wrongful conviction and imprisonment for possession of a firearm by a convicted felon was properly dismissed. His claim that the firearm was inoperable was unavailing because he offered no evidence that it could not be readily converted to expel a projectile, and the State was not required to prove that the weapon was operable at the time of his arrest. *Hymes v. State*, 121 So. 3d 938 (Miss. Ct. App. 2013).

State met its burden of proving each of the elements of possession of a firearm by a convicted felon beyond a reasonable doubt because a handgun, discovered by a police officer during a protective sweep of a vehicle, was found under the driver's seat; because defendant was the driver of

the vehicle, the handgun was subject to his dominion and control, even though it was not discovered in his actual physical possession. *Lewis v. State*, 112 So. 3d 1092 (Miss. Ct. App. 2013).

### 9. Double jeopardy.

Defendant's sentence under Miss. Code Ann. §§ 97-37-5(1) and 97-37-37(2) was proper; section 97-37-37(2) merely imposes an elevated sentence for use or display of a firearm during the commission of a felony, and it does not delineate an independent substantive offense in violation of double jeopardy protections. *Lewis v. State*, 112 So. 3d 1092 (Miss. Ct. App. 2013).

## § 97-37-37. Enhanced penalty for use of firearm during commission of felony.

### JUDICIAL DECISIONS

1. Applicability.
2. Double jeopardy.
3. Evidence.
4. Jury trial.

#### 1. Applicability.

Because defendant was not convicted of any charge involving the use and display of the firearm and the jury was not instructed to determine if defendant had used or displayed the firearm that he possessed in the commission of a felony, the circuit court erroneously used a fact that had not been determined by the jury to enhance his sentence beyond the statutory maximum. *Johnson v. State*, — So. 3d —, 2013 Miss. App. LEXIS 859 (Miss. Ct. App. Dec. 10, 2013).

Because no authority holds that the indictment must make reference to the enhancement statute, and the statute specifying what the indictment must contain does not require such inclusion, and because the counts in the indictment alleged that defendant committed an aggravated assault by shooting the victim in the back with a firearm and that he was a convicted felon in unlawful possession of a firearm, there was no unfair surprise regarding defendant's sentence enhancement, and the enhanced portion of his sentence was legal. *Sallie v. State*, — So.

#### 10. New trial.

Defendant was not entitled to a new trial on a felony possession charge since the jury was entitled to believe the victim's testimony that defendant had a gun on his person when he came outside, and that defendant produced the gun and shot him; the finding that defendant willfully possessed the firearm with which he shot the victim was supported by the victim's testimony, and officer one's testimony that he saw defendant holding the gun. *Gilmore v. State*, 119 So. 3d 278 (Miss. 2013).

3d —, 2013 Miss. App. LEXIS 833 (Miss. Ct. App. Dec. 3, 2013).

Trial court erred in enhancing defendant's sentence for using a firearm during the commission of a felony because the jury did not specifically find defendant guilty of using a firearm in the commission of the crime of manslaughter; because the fact that defendant used a firearm during the commission of the felony crime of manslaughter could be inferred only from the evidence, not the jury's findings, the trial court was not permitted to enhance defendant's sentence. *Waits v. State*, 119 So. 3d 1024 (Miss. 2013).

#### 2. Double jeopardy.

Defendant's sentence enhancement did not give rise to a double jeopardy claim. *Clark v. State*, 127 So. 3d 292 (Miss. Ct. App. 2013).

Defendant's sentence enhancement for using a firearm in the commission of a felony, to wit, aggravated assault, did not violate principles of double jeopardy because the legislature clearly intended an additional term of imprisonment be applied cumulatively to the underlying offense. *Wansley v. State*, 114 So. 3d 793 (Miss. Ct. App. 2013), writ of certiorari denied by 127 So. 3d 1115, 2013 Miss. LEXIS 655 (Miss. 2013).

Miss. Code Ann. § 97-37-37(2) merely imposes an elevated sentence for use or display of a firearm during the commission of a felony, and it does not delineate an independent substantive offense in violation of double jeopardy protections. *Lewis v. State*, 112 So. 3d 1092 (Miss. Ct. App. 2013).

### 3. Evidence.

Trial court improperly applied a sentence enhancement because there was insufficient evidence showing that defendant used or displayed a firearm during the commission of a felony. The evidence reflected that defendant merely possessed

the gun, but the trial court incorrectly determined that possession alone constituted use or display. *Clark v. State*, 127 So. 3d 292 (Miss. Ct. App. 2013).

### 4. Jury trial.

Trial court's application of a sentencing enhancement violated defendant's right to a trial by jury because defendant was not found to be guilty of every element of the crime beyond a reasonable doubt. The jury found defendant guilty of possession of a weapon by a felon, but did not find that defendant used the firearm during the commission of the felony. *Clark v. State*, 127 So. 3d 292 (Miss. Ct. App. 2013).





# **TITLE 99**

## **CRIMINAL PROCEDURE**

### **CHAPTER 1**

#### **General Provisions; Time Limitations; Costs**

##### **§ 99-1-5. Time limitation on prosecutions.**

#### **JUDICIAL DECISIONS**

##### **4. Miscellaneous.**

Even if defendant had timely objected to the indictment alleging the expiration of the statute of limitations for the first two years of the indictment's time span, the circuit court's solution would have been to amend the indictment to reflect a time period not in conflict with any alleged statute-of-limitations issues, which was essentially done when defense counsel requested and was granted jury instructions that limited the time span for the offenses to 15 months that were within the statute

of limitations. *Hines v. State*, 126 So. 3d 985 (Miss. Ct. App. 2013).

Trial counsel was not ineffective for failing to investigate the State's delay in presenting the charge to the grand jury because the State had two years in which to indict defendant, and the State did so within one year and twenty-five days of defendant's arrest. *Jackson v. State*, 122 So. 3d 1220 (Miss. Ct. App. 2013), writ of certiorari denied by 123 So. 3d 450, 2013 Miss. LEXIS 531 (Miss. 2013).

### **CHAPTER 3**

#### **Arrests**

##### **§ 99-3-7. When arrests may be made without warrant.**

#### **JUDICIAL DECISIONS**

##### **7. Probable cause, generally.**

##### **8. —Information obtained from informant.**

##### **7. Probable cause, generally.**

##### **8. —Information obtained from informant.**

Detective had both exigent circumstances and probable cause to make the

warrantless entry into the residence and arrest defendant after investigating the reliable anonymous tip concerning drug activity and going in hot pursuit of defendant after he fled from lawful questioning about that tip. *Cooper v. State*, — So. 3d —, 2013 Miss. App. LEXIS 686 (Miss. Ct. App. Oct. 15, 2013).

##### **§ 99-3-11. Arresting officer or person may break into house.**

#### **JUDICIAL DECISIONS**

##### **2. Hot pursuit.**

Detective had both exigent circumstances and probable cause to make the warrantless entry into the residence and

arrest defendant after investigating the reliable anonymous tip concerning drug activity and going in hot pursuit of defendant after he fled from lawful questioning

about that tip. *Cooper v. State*, — So. 3d —, 2013 Miss. App. LEXIS 686 (Miss. Ct. App. Oct. 15, 2013).

## CHAPTER 7

### Indictment

#### § 99-7-21. Demurrers; when filed; amendment of indictment.

### JUDICIAL DECISIONS

#### 2. Amendment.

Even if defendant had timely objected to the indictment alleging the expiration of the statute of limitations for the first two years of the indictment's time span, the circuit court's solution would have been to amend the indictment to reflect a time period not in conflict with any alleged

statute-of-limitations issues, which was essentially done when defense counsel requested and was granted jury instructions that limited the time span for the offenses to 15 months that were within the statute of limitations. *Hines v. State*, 126 So. 3d 985 (Miss. Ct. App. 2013).

## CHAPTER 11

### Jurisdiction and Venue

#### § 99-11-3. Local jurisdiction; venue; venue regarding indictments returned by state grand jury [Subsection (2) repealed effective July 1, 2014].

### JUDICIAL DECISIONS

2. Proof of venue, generally.

3. —Judicial notice.

#### 2. Proof of venue, generally.

#### 3. —Judicial notice.

In a driving under the influence case, the State established the court's jurisdiction; although the arresting officer did not

testify that the events occurred in the relevant city and county, there was direct and circumstantial evidence to show the crimes occurred there, and the court properly took judicial notice under Miss. R. Evid. 201(b) that the area where defendant was stopped was within the city. *Russell v. State*, 126 So. 3d 145 (Miss. Ct. App. 2013).



## CHAPTER 15

## Pretrial Proceedings

## IN GENERAL

## § 99-15-35. Change of venue; how need shown; grounds.

## JUDICIAL DECISIONS

## 4. Review.

Defendant's change of venue issue was without merit because defendant did not file a proper motion for change of venue,

and there was no indication that defendant did not receive a fair trial by an impartial jury. *Copple v. State*, 117 So. 3d 651 (Miss. Ct. App. 2013).

## CHAPTER 17

## Trial

## § 99-17-1. Indictments to be tried within 270 days of arraignment.

## JUDICIAL DECISIONS

2. Delay attributed to defendant.

13. Demand for trial.

## 2. Delay attributed to defendant.

Defendant's right to a speedy trial was not violated because defendant neither alleged prejudice to the defense of the charge against defendant, nor did defendant demonstrate that defendant had suffered anxiety from the charge. Furthermore, the record reflected that the majority of the delay was attributable to defendant as the trial was twice continued due to defense counsel's illness, and defendant signed both continuance orders, waiving the right to a speedy trial. *Jackson v. State*, 121 So. 3d 313 (Miss. Ct. App. 2013).

## 13. Demand for trial.

Defendant was procedurally barred on direct appeal from raising the issue of whether defendant's right to a speedy trial was violated because, while defendant filed numerous motions on the issue, neither defendant nor, counsel set them for a hearing or requested a ruling. Dismissal without prejudice preserved defendant's ability to raise the issue in a motion for post-conviction relief in association with an ineffective assistance of counsel claim for failure to request a hearing on the motions. *Ellis v. State*, — So. 3d —, 2013 Miss. App. LEXIS 718 (Miss. Ct. App. Oct. 29, 2013).

## § 99-17-20. Capital murder or other crimes punishable by death.

## JUDICIAL DECISIONS

## 1. In general.

Defendant juvenile's indictment was not defective because the capital-murder statute was cited in the heading of the

indictment but not the body of the indictment since the indictment listed the appropriate section and subsection in the heading and tracked the language of the

statute in the body, and this section did not specify where the charged section and subsection number had to appear in the indictment. *Hye v. State*, — So. 3d —, 2013 Miss. App. LEXIS 292 (Miss. Ct. App. May 28, 2013).

Indictment for robbery was appropriate because defendant's due process rights

were not violated as the indictment was not required to have specified the items alleged to have been taken in the robbery. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

## CHAPTER 19

### Judgment, Sentence, and Execution

#### IN GENERAL

### § 99-19-5. Findings of jury.

#### JUDICIAL DECISIONS

#### 3. Lesser included offenses.

Because, in attempting to prove assault, the State introduced evidence that defendant began swinging at an officer while he was being arrested, and it would have been impossible for defendant to have committed simple assault on a law enforcement officer without committing the

crime of resisting arrest, the offense of resisting arrest was a lesser-included offense of the charged crime of simple assault, and the trial judge was authorized to grant the State's request for a resisting-arrest instruction. *Edwards v. State*, 124 So. 3d 105 (Miss. Ct. App. 2013).

### § 99-19-20. Sentence; imposition of fine; payment; imprisonment for nonpayment; indigent defendants.

#### JUDICIAL DECISIONS

#### I. UNDER CURRENT LAW.

#### 1. In general.

#### I. UNDER CURRENT LAW.

#### 1. In general.

Trial court did not err by revoking post-release supervision because the probationer, upon the probationer's release became gainfully employed and, as the probationer admitted, was making enough money to pay the costs and fines

levied against the probationer, and could pay, as well, a monthly sum toward costs of the probationer's supervision, as the probationer was ordered to do. However, the probationer did not pay the costs and the fines. *Ross v. State*, 122 So. 3d 136 (Miss. Ct. App. 2013).

Probationer had to pay a fine immediately and/or the fine was a condition of probation because no installment plan was set up. *Ross v. State*, 122 So. 3d 136 (Miss. Ct. App. 2013).

## § 99-19-23. Sentence; credit for time of prisoner's pre-trial or pre-appeal confinement.

### JUDICIAL DECISIONS

#### 1. In general.

Circuit court did not err in sentencing defendant to forty years in prison for armed robbery in violation of Miss. Code Ann. § 97-3-79 because when the circuit judge announced the sentence, it simultaneously gave defendant credit for all of his

pretrial custody time pursuant to Miss. Code Ann. § 99-19-23, which ultimately shortened defendant's announced sentence to under forty years. *Foster v. State*, — So. 3d —, 2013 Miss. App. LEXIS 135 (Miss. Ct. App. Mar. 26, 2013).

### SENTENCING OF HABITUAL CRIMINALS

## § 99-19-81. Sentencing of habitual criminals to maximum term of imprisonment.

### JUDICIAL DECISIONS

2. Sufficiency of prior sentences, generally.
4. —Separate incidents.
7. Sentencing trial or hearing, generally.
- 8.5. — Disqualification of trial judge.
9. —As constituting double jeopardy.
11. Amendment of indictment.
17. Habitual offender sentences.

#### 2. Sufficiency of prior sentences, generally.

#### 4. —Separate incidents.

Defendant's previous crimes, even though listed in a single indictment, were properly considered as separate crimes for purposes of habitual-offender sentencing because the charges in defendant's indictment were separated into separate and distinct counts; the sales clearly occurred at different times; and defendant served 10 years for each crime. *Johnson v. State*, — So. 3d —, 2013 Miss. App. LEXIS 859 (Miss. Ct. App. Dec. 10, 2013).

#### 7. Sentencing trial or hearing, generally.

#### 8.5. — Disqualification of trial judge.

Fact that the trial judge was once a prosecutor and who, as prosecutor, signed an indictment in a case which resulted in a felony conviction later used for defendant's habitual-offender sentencing, did

not disqualify the trial judge from presiding over the habitual-offender sentencing hearing. *Luster v. State*, — So. 3d —, 2013 Miss. App. LEXIS 460 (Miss. Ct. App. July 30, 2013).

#### 9. —As constituting double jeopardy.

Having failed to prove at trial that defendant was a habitual offender, the State could not attempt to prove his habitual-offender status on remand, as that would violate the prohibition against double jeopardy set forth in Miss. Const. art. III, § 22. *Grayer v. State*, — So. 3d —, 2013 Miss. LEXIS 187 (Miss. May 2, 2013), opinion withdrawn by, substituted opinion at, remanded by 120 So. 3d 964, 2013 Miss. LEXIS 370 (Miss. 2013).

#### 11. Amendment of indictment.

Trial court did not err in amending the indictment after jury selection had been completed to charge defendant as a habitual offender as the amendment was permitted and as defendant was not unfairly surprised. *Ferguson v. State*, — So. 3d —, 2013 Miss. App. LEXIS 423 (Miss. Ct. App. July 16, 2013).

#### 17. Habitual offender sentences.

Defendant was properly sentenced as a nonviolent habitual offender because, while he had not served a year in prison for one of the felony-convictions in the



indictment, he was served with a copy of the State's motion to amend the indictment, which resulted in his indicted status being changed from non-habitual offender to habitual offender, and defendant had adequate notice and was not unfairly surprised by the State's use of his prior convictions. *Curry v. State*, — So. 3d —, 2013 Miss. App. LEXIS 681 (Miss. Ct. App. Oct. 15, 2013).

Court committed plain error by sentencing defendant as a habitual offender be-

cause the State failed to place certified copies of his prior convictions into the record or to offer any evidence to support his habitual-offender status, other than a recitation of his prior felony convictions. *Grayer v. State*, — So. 3d —, 2013 Miss. LEXIS 187 (Miss. May 2, 2013), opinion withdrawn by, substituted opinion at, remanded by 120 So. 3d 964, 2013 Miss. LEXIS 370 (Miss. 2013).

## § 99-19-83. Sentencing of habitual criminals to life imprisonment.

### JUDICIAL DECISIONS

1. In general.
9. Habitual offender portion of indictment.
10. Proof of prior conviction; in Mississippi.
14. Particular circumstances.

#### 1. In general.

Sexual intercourse between an underage child and an adult clearly is a crime of violence for purposes of the habitual offender statute, as sexual intercourse cannot occur without the exertion of some degree of physical force, even if it entails no pain or bodily harm and leaves no mark. The same is true for any other sex-crime victim who lacks the capacity to consent. *Taylor v. State*, 122 So. 3d 707 (Miss. 2013).

#### 9. Habitual offender portion of indictment.

Conviction that the State relied upon to prove defendant's habitual-offender status was proper because the revocation of defendant's post-release supervision for his failure-to-register-as-a-sex-offender conviction was timely, and the subsequent one year defendant served for the second revocation was also valid; since both revocations were timely, the time served was valid. *Brown v. State*, 119 So. 3d 1079 (Miss. Ct. App. 2013).

#### 10. Proof of prior conviction; in Mississippi.

Defendant's sentence of life imprisonment without parole as a habitual of-

fender was appropriate because the State of Mississippi presented evidence showing that defendant was sentenced to and served terms of one year or more in a state penal institution on at least two of the three felony convictions, and at least one of these felonies was a crime of violence. *Bunch v. State*, 123 So. 3d 484 (Miss. Ct. App. 2013).

#### 14. Particular circumstances.

In sentencing defendant as a habitual offender, the trial court properly considered his conviction of robbery in Tennessee, as Tenn. Code Ann. § 39-13-401 defines robbery as the intentional or knowing theft of property from the person of another by violence or putting the person in fear, and thus is a violent crime for purposes of the requirements of Miss. Code Ann. 99-19-83. *Conner v. State*, — So. 3d —, 2013 Miss. App. LEXIS 226 (Miss. Ct. App. Apr. 30, 2013).

Pen pack indicating that defendant had been convicted of robbery and had pled guilty to armed robbery with a deadly weapon, both felonies, and which had separate victims and occurred at separate times, was sufficient evidence to prove his status as a habitual offender. *Conner v. State*, — So. 3d —, 2013 Miss. App. LEXIS 226 (Miss. Ct. App. Apr. 30, 2013).

SEPARATE SENTENCING PROCEEDING TO DETERMINE  
PUNISHMENT IN CAPITAL CASES

**§ 99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.**

**JUDICIAL DECISIONS**

**I. UNDER CURRENT LAW.**

1. In general.
5. Aggravating factors, generally.
18. Jury instructions, generally.

**I. UNDER CURRENT LAW.**

**1. In general.**

State of Mississippi was permitted to impeach defense witnesses, who testified at a sentencing hearing as to defendant's good character, by asking if the witnesses were aware that defendant had pleaded guilty to a felony charge of credit-card fraud. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

**5. Aggravating factors, generally.**

Evidence legally or factually supported the jury's finding of each of the statutory aggravating circumstances of (1) the capital murder was committed during the commission of the crime of robbery; (2) the

capital murder was committed for the purpose of avoiding arrest; and (3) the capital murder was especially heinous, atrocious, or cruel. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

**18. Jury instructions, generally.**

Trial court committed no error in granting the State of Mississippi's omnibus instruction and in denying defendant's proffered mercy instruction because the court properly instructed the jury on weighing the mitigating circumstances versus the aggravating circumstances in defendant's capital murder trial. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

Because the jury was properly instructed on the elements of robbery, the jury was therefore permitted to consider as an aggravating circumstance whether the killing of the victim was committed during the commission of the crime of robbery. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

**§ 99-19-103. Instructions; aggravating circumstances shall be designated by jury in writing upon recommending death; effect of jury's failure to agree on punishment.**

**JUDICIAL DECISIONS**

**14. Reasonable time for deliberations.**

Trial court was within its discretion in denying defendant's motions for a directed verdict because the determination of what

was a reasonable time for deliberation was within the trial judge's discretion. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

**§ 99-19-105. Review by State Supreme Court of imposition of death penalty.**

**JUDICIAL DECISIONS**

**I. UNDER CURRENT LAW.**

**7. Proportionality.**

**13. Particular cases; death penalty upheld.**

**I. UNDER CURRENT LAW.**

**7. Proportionality.**

Defendant's sentence of death by lethal injection for the crime of capital murder with the underlying felony of robbery was not excessive or disproportionate to the penalty imposed in similar cases and was not imposed under the influence of passion, prejudice, or any other arbitrary factor. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

**13. Particular cases; death penalty upheld.**

Defendant's act of carjacking per se involved conduct that presented a serious

potential risk of physical violence to another, and therefore any conviction for carjacking constituted a felony involving the use or threat of violence to the person for purposes of aggravating circumstances in a death penalty case. *Galloway v. State*, 122 So. 3d 614 (Miss. 2013).

Evidence legally or factually supported the jury's finding of each of the statutory aggravating circumstances of (1) the capital murder was committed during the commission of the crime of robbery; (2) the capital murder was committed for the purpose of avoiding arrest; and (3) the capital murder was especially heinous, atrocious, or cruel. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013).

**CHAPTER 37**

**Restitution to Victims of Crimes**

**§ 99-37-3. Imposition and amount of restitution.**

**JUDICIAL DECISIONS**

**2. Illustrative cases.**

Inmate's claim that his sentence was illegal because he was ordered to pay restitution to a victim of an aggravated assault count that was dismissed failed as: (1) the inmate did not object to the imposition of restitution; (2) the term of imprisonment and assessment of court costs were within the parameters of punishment for aggravated assault; (3) a requirement that a defendant pay restitution to a victim was statutorily authorized

as part of a criminal sentence under Miss. Code Ann. § 99-37-3(1); (4) the inmate admitted to guilt to the dismissed counts before the dismissal; and (5) the imposition of an illegal sentence, one that violated a fundamental constitutional right, was a prerequisite to trump the procedural bars to entitle the inmate to post-conviction relief. *Sims v. State*, — So. 2d —, 2013 Miss. App. LEXIS 102 (Miss. Ct. App. Mar. 5, 2013).



## CHAPTER 39

### Post-Conviction Proceedings

#### ARTICLE 1.

#### MISSISSIPPI UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT.

### § 99-39-1. Short title.

#### JUDICIAL DECISIONS

#### 2. Post-conviction motion properly denied.

Trial court did not err in dismissing appellant's motion for post-conviction relief because no evidence was presented that appellant was misinformed during his sentencing hearing; under Miss. Code

Ann. § 47-7-3(1)(h) appellant was not eligible for parole, and the trial court stated repeatedly at the sentencing hearing that the only sentence that could be imposed was life imprisonment. *Collier v. State*, 112 So. 3d 1088 (Miss. Ct. App. 2013).

### § 99-39-5. Grounds for relief; time limitations; "biological evidence" defined.

#### JUDICIAL DECISIONS

##### I. UNDER CURRENT LAW.

- 5. Ineffective assistance of counsel.
- 8. Timeliness.
- 17.5. Miscellaneous.

##### I. UNDER CURRENT LAW.

#### 5. Ineffective assistance of counsel.

Inmate's ineffective assistance claim failed as: (1) the claim was time-barred under Miss. Code Ann. § 99-39-5(2); (2) the inmate had entered a best interests plea and did not show that but for counsel's errors, he would have insisted on going to trial; (3) the inmate did not deny that he was the driver of the vehicle or that he injured the three victims; (4) with his attorney's help, he was able to enter a best interest plea to one of three aggravated assault charges, and his possible 60-year sentence under Miss. Code Ann. § 97-3-7(2)(a) was reduced to a possible 20-year sentence, of which 18 years and 10 months were post-release supervision; and (5) the inmate was ordered to serve the time he had served while awaiting sentencing, and the sentence effectively released him from prison immediately to

start his post-release supervision. *Sims v. State*, — So. 2d —, 2013 Miss. App. LEXIS 102 (Miss. Ct. App. Mar. 5, 2013).

#### 8. Timeliness.

Reason that defendant asserted entitlement to an out-of-time appeal of defendant's burglary conviction — that defendant told defendant's new attorney that defendant wanted to revoke defendant's waiver and pursue an appeal two days after a hearing on defendant's guilty plea to aggravated assault — was not proof that defendant asked defendant's attorney to appeal within the time allowed for giving notice of an appeal. Therefore, because defendant no longer had the right to appeal at the time defendant revoked defendant's waiver of appeal, defendant's revocation did not entitle defendant to an out-of-time appeal. *Conwill v. State*, — So. 3d —, 2013 Miss. App. LEXIS 778 (Miss. Ct. App. Nov. 19, 2013).

Newly discovered evidence exception to the procedural/time bar for an inmate's postconviction relief motion existed because an aggravated assault victim's recantation of his prior trial testimony was

not newly discovered evidence and did not support a new trial for the inmate. *Van Norman v. State*, 114 So. 3d 799 (Miss. Ct. App. 2013).

Since appellant pleaded guilty, the motion for reconsideration of the judgment dismissing his motion for post-conviction relief and the affidavit were submitted after the three-year statute of limitations for filing a motion for post-conviction relief had passed, Miss. Code Ann. § 99-39-5; despite the fact that appellant's arguments were first raised outside the three-year statute of limitations, his self-serving affidavit did not meet the requirements of the post-conviction-relief statute, Miss. Code Ann. § 99-39-9(1)(e), because appellant failed to provide supporting affidavits other than his own to prove his plea bargain was for a sentence of life with parole. *Collier v. State*, 112 So. 3d 1088 (Miss. Ct. App. 2013).

Circuit court properly dismissed appellant's motion for post-conviction collateral relief (PCR) because it was time-barred under the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-5(2); the motion was filed over seven years after he was convicted, and appellant failed to show that an exception to the successive-writ bar or the time-bar applied. *Nichols v. State*, 120 So. 3d 433 (Miss. Ct. App. 2013), writ of certiorari denied by 2014 Miss. LEXIS 63 (Miss. Jan. 23, 2014).

Circuit court correctly found that appellant's post-conviction relief (PCR) motion was time-barred under Miss. Code Ann. § 99-39-5(2)(b) because appellant filed his PCR motion twenty-seven years after the

limitations period had expired. *Whetstone v. State*, 109 So. 3d 616 (Miss. Ct. App. 2013).

### 17.5. Miscellaneous.

Defendant's motion for leave to file a successive petition for post-conviction relief was denied because defendant's Batson claim, cumulative-error claim, and ineffective-assistance-of-counsel claim previously had been litigated before the supreme court in post-conviction proceedings and were barred by the doctrine of res judicata; those claims also were subject to review in defendant's federal habeas proceedings and were denied at every level. *Manning v. State*, — So. 3d —, 2013 Miss. LEXIS 186 (Miss. Apr. 25, 2013).

Defendant's motion for leave to file a successive petition for post-conviction relief was denied because defendant failed to present any competent evidence that a State's witness recanted his trial testimony. *Manning v. State*, — So. 3d —, 2013 Miss. LEXIS 186 (Miss. Apr. 25, 2013).

Defendant's motion for leave to file a successive petition for post-conviction relief pursuant to Miss. Code Ann. § 99-39-5(2)(a)(ii) was denied because defendant failed to demonstrate a reasonable probability that he would not have been convicted or would have received a lesser sentence if favorable results had been obtained through forensic DNA testing at the time of the original prosecution; the absence of defendant's DNA did not preclude his participation in the crimes charged. *Manning v. State*, — So. 3d —, 2013 Miss. LEXIS 186 (Miss. Apr. 25, 2013).

## § 99-39-7. Filing motion in trial court; filing motion to proceed in trial court with supreme court.

### JUDICIAL DECISIONS

#### 6. Jurisdiction.

Appellate court could not consider prisoner's appeal of the denial of his postconviction relief motion because the trial court had lacked jurisdiction to consider the motion because the motion was

filed in the wrong county and the prisoner had failed to obtain permission to file the motion from the Mississippi Supreme Court. *Nelson v. Bingham*, 116 So. 3d 172 (Miss. Ct. App. 2013).



**§ 99-39-9. Requirements of motion and service.**

**JUDICIAL DECISIONS**

2. Absence of supporting affidavits.
6. Motion properly denied.

**2. Absence of supporting affidavits.**

Since appellant pleaded guilty, the motion for reconsideration of the judgment dismissing his motion for post-conviction relief and the affidavit were submitted after the three-year statute of limitations for filing a motion for post-conviction relief had passed, Miss. Code Ann. § 99-39-5; despite the fact that appellant's arguments were first raised outside the three-year statute of limitations, his self-serving affidavit did not meet the requirements of the post-conviction-relief statute, Miss. Code Ann. § 99-39-9(1)(e), because appellant failed to provide supporting af-

fidavits other than his own to prove his plea bargain was for a sentence of life with parole. *Collier v. State*, 112 So. 3d 1088 (Miss. Ct. App. 2013).

**6. Motion properly denied.**

Pursuant to Miss. Code Ann. § 99-39-9(1)(e), 99-39-11(2), defendant's motion for postconviction relief was properly dismissed without an evidentiary hearing because an alleged confession by defendant's brother was not sworn under oath, and defendant did not show why the brother could not have testified during defendant's trial, which meant that the confession was not newly discovered. *Johnson v. State*, 110 So. 3d 353 (Miss. Ct. App. 2013).

**§ 99-39-11. Judicial examination of original motion; dismissal; filing answer; court ordered testing of biological evidence.**

**JUDICIAL DECISIONS**

6. Evidentiary hearing.
11. Timeliness of motion.
12. Dismissal.

**6. Evidentiary hearing.**

Pursuant to Miss. Code Ann. § 99-39-9(1)(e), 99-39-11(2), defendant's motion for postconviction relief was properly dismissed without an evidentiary hearing because an alleged confession by defendant's brother was not sworn under oath, and defendant did not show why the brother could not have testified during defendant's trial, which meant that the confession was not newly discovered. *Johnson v. State*, 110 So. 3d 353 (Miss. Ct. App. 2013).

Inmate's post-conviction relief motion was properly denied without an evidentiary hearing under Miss. Code Ann. § 99-39-11(2) as it was plain from the face of the motion that it was barred and there was no need for an evidentiary hearing. *Sims v. State*, — So. 2d —, 2013 Miss. App. LEXIS 102 (Miss. Ct. App. Mar. 5, 2013).

**11. Timeliness of motion.**

Dismissal of defendant's motion for an out-of-time appeal of defendant's burglary conviction was appropriate because defendant no longer had the right to appeal at the time defendant revoked defendant's waiver of appeal. Therefore, defendant's revocation did not entitle defendant to an out-of-time appeal. *Conwill v. State*, — So. 3d —, 2013 Miss. App. LEXIS 778 (Miss. Ct. App. Nov. 19, 2013).

**12. Dismissal.**

Dismissal of the inmate's postconviction motion was erroneous, as the affidavits of the inmate and the inmate's sister indicated that he was misinformed as to his eligibility for trusty earned time, the inmate was entitled to an evidentiary hearing on whether his guilty plea was knowingly, intelligently, and voluntarily entered. In addition, the inmate successfully alleged that he received ineffective assistance of counsel due to the incorrect advice about his eligibility to earned time



and thus, was entitled to an evidentiary hearing to explore the merits of that claim. *Sylvester v. State*, 113 So. 3d 618 (Miss. Ct. App. 2013).

**§ 99-39-23. Conduct of evidentiary hearing; right to counsel; finality of order as bar to subsequent motions; burden of proof; appointment of postconviction counsel in death penalty cases.**

**JUDICIAL DECISIONS**

2. Evidentiary hearing, generally.
7. Successive writ.
10. Relief denied.

**2. Evidentiary hearing, generally.**

Post-conviction relief court violated Miss. R. Evid. 606(b) by allowing a juror to be questioned about how alleged extraneous information affected his deliberations. *Roach v. State*, 116 So. 3d 126 (Miss. 2013).

**7. Successive writ.**

Circuit court properly dismissed appellant's motion for post-conviction collateral relief (PCR) as procedurally barred as a successive writ; because appellant failed to show that an exception applied, his PCR motion was barred under the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-23(6). *Nichols v. State*, 120 So. 3d 433 (Miss. Ct. App. 2013), writ of certiorari denied by 2014 Miss. LEXIS 63 (Miss. Jan. 23, 2014).

Circuit court correctly found that appellant's post-conviction relief (PCR) motion was procedurally barred as a successive writ under Miss. Code Ann. § 99-39-23(6) because when appellant filed his second PCR motion he failed to produce any evidence that would satisfy any of the excep-

tions listed in § 99-39-23(6); additionally, the record revealed no evidence that would satisfy the exceptions. *Whetstone v. State*, 109 So. 3d 616 (Miss. Ct. App. 2013).

Inmate's post-conviction relief (PCR) motion was properly dismissed as a successive writ under Miss. Code Ann. § 99-39-23(6) where: (1) the inmate had previously challenged his conviction and his previous motion was dismissed; (2) although the inmate's first motion was titled a motion to vacate revocation hearing, because it challenged his conviction, it was correctly treated as a PCR motion; and (3) the inmate raised no statutory exception to the successive-writ bar and did not prove a violation of a fundamental right. *Sims v. State*, — So. 2d —, 2013 Miss. App. LEXIS 102 (Miss. Ct. App. Mar. 5, 2013).

**10. Relief denied.**

Post-conviction relief court properly denied appellant's request for a new trial based on evidence that police officers involved in the case allegedly told a juror about appellant's probable sentence if convicted, as the court concluded that the juror lacked credibility and discounted his uncorroborated testimony. *Roach v. State*, 116 So. 3d 126 (Miss. 2013).

CHAPTER 49

Preservation and Accessibility of Biological Evidence

§ 99-49-1. Legislative intent; definitions; preservation of evidence procedures; remedies for noncompliance.

JUDICIAL DECISIONS

1.-2. [Reserved for future use.]

3. Hypothetical evidence.

1.-2. [Reserved for future use.]

3. Hypothetical evidence.

In a murder case, the State did not violate defendant's due process rights by

destroying evidence in violation of Miss. Code Ann. § 99-49-1 because the very existence of fingerprint or DNA evidence on the murder weapon was nothing more than a hypothetical. *Childs v. State*, — So. 2d —, 2013 Miss. LEXIS 302 (Miss. May 23, 2013).













